IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

JACK R. YOUNGS, JAMES G. CORELL, WILLIAM R. MCDAVID, and MARGERET B. MCDAVID Plaintiffs, vs. JACK BEHNKEN, NANCY BEHNKEN, JOHN BEHNKEN, SANDI BEHNKEN, WILLIAM BEHNKEN, AMERICAN NUTRITION INC., a Utah Corporation; ROCKY MOUNTAIN MILLING LLC, a Utah Limited Liability Company; SOLAR ENGINEERING LTD., a Utah Limited Partnership, Defendants/Counterclaim Plaintiffs, vs. JACK R. YOUNGS, JAMES G. CORELL, WILLIAM R. MCDAVID, MARGERET B. MCDAVID, and BOWLES RICE MCDAVID GRAFF & LOVE, a West Virginia Law Firm, Counterclaim Defendants.	ORDER ON MOTIONS TO CONFIRM AND VACATE ARBITRATION AWARDS Case No. 1:04-CV-00183 PGC

For years, the minority and majority shareholders of the close corporation American Nutrition, Inc., have battled over the value of the minority shareholders' interest. In December 2005, an arbitrator said that the value of a 12.75% minority interest in ANI was $7,514,679. The defendants, ANI's majority shareholders, now seek to vacate or modify the arbitrator's decision, while the plaintiffs — some of ANI's minority shareholders — ask the court to confirm it.

The court holds that vacatur is inappropriate because none of the grounds for vacatur specified in Utah Code Ann. § 78-31a-124 exist. The court also holds that the award should be modified to correct a computational error and reflect the actual amount of the plaintiffs' interests. Instead of the 12.75% stated in the decision, the plaintiffs actually own 11.45% of ANI. The court therefore modifies the award and orders ANI to purchase the plaintiffs' 11.45% ownership interests for $6,748,476.57.

FACTUAL BACKGROUND

This dispute involves claims by some minority shareholders of American Nutrition, Inc., that the majority-shareholder defendants usurped ANI's corporate opportunities and transferred ANI's assets, all to plaintiffs' detriment. Defendant Jack Behnken is the president of ANI. He also owns several related companies. The plaintiffs' grievances relate to Mr. Behnken's alleged dealings between ANI and these other companies. Other defendants include Mr. Behnken's wife and three adult children — John, Sandi, and William — all of whom also owed ANI stock ("the Behnken parties").

From mid-2003 until late 2004, the minority shareholder plaintiffs attempted to resolve their disputes with the Behnken parties by mediation, agreeing that if that failed, they would

proceed to arbitration. In December 2004, after the Behnken parties attempted to rescind the memorandum of understanding that put in place the arbitration approach, the minority shareholder plaintiffs filed this case to compel the Behnken parties to arbitrate as they promised in the MOU.

In May 2005, all the parties to this lawsuit except the Bowles Rice law firm entered into a new arbitration agreement. The arbitrator was to determine the value of all the plaintiffs' shares, or 11.45% of ANI's stock, after which ANI was to purchase those shares for the specified price. The specifics of the arbitration agreement — which provided exceedingly broad discretion to the arbitrator — are discussed in greater detail below. The arbitrator was to issue a decision by October 17, 2005. The parties who signed this agreement then moved the court to stay this case pending the outcome of the arbitration. The court granted the motion and stayed the case.

In December 2005, all the parties to the arbitration agreement filed a joint status report and requested that the court continue the stay in this case. The arbitrator apparently had not yet completed his decision, but the parties expected that the decision would be issued by February 2006. The court continued the stay as requested.

When the status report was filed, the Behnken parties — Jack, Nancy, and their three adult children — were all represented by the same attorney. No party (through an attorney or otherwise) objected in this court to the continued stay. And the record indicates that as of December 15, 2005, no party had lodged any timeliness objections with the arbitrator.

On December 30, 2005, the arbitrator issued his decision. He ordered ANI to purchase 12.75% of its outstanding shares for $7,514,679. Soon after this decision, the defendants

objected to the award, claiming that it was untimely and was based on irrelevant financial data. The arbitrator denied the defendants' objections. The pending motions to confirm and vacate the award followed. And now, for the first time in this case, the three adult Behnken children have retained separate counsel from their parents, who filed an addition motion to vacate on their behalf. This case is properly before the court on diversity jurisdiction.

I. Defendants Have Not Shown Any Basis Under Utah Law to Permit Vacatur of the Award.

Under Utah law, which by contract governs this dispute, "'[a] trial court faced with a motion to vacate or modify an arbitration award is limited to determining whether any of the very limited grounds for modification or vacatur exist.'"[1] This narrow standard has been in place in Utah for several decades; as early as 1918, the Utah Supreme Court held that courts will not disturb arbitration awards "on account of irregularities or informalities, or because the court does not agree with the award, so long as the proceeding has been fair and honest and the substantial rights of the parties have been respected."[2] Indeed, the Utah Supreme Court has long emphasized that "[o]rdinarily a court has no authority to review the action of arbitrators to *correct errors* or to substitute its conclusion for that of the arbitrators acting honestly and within the scope of their authority."[3]

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[1] *Pacific Development, L.C. v. Orton*, 23 P.3d 1035, 1037 (Utah 2001) (quoting *Buzas Baseball v. Salt Lake Trappers*, 925 P.2d 941, 946–47 (Utah 1996)).

[2] *Bivans v. Utah Lake Land, Water & Power Co.*, 174 P. 1126, 1130 (Utah 1918).

[3] *Giannopulos v. Pappas*, 15 P.2d 353, 356 (Utah 1932) (emphasis added).

One of the "very limited" statutory grounds for vacatur raised by all the defendants is that Mr. Heald "exceeded [his] authority."[4] "For a court reviewing an arbitration award to determine that an arbitrator exceeded his authority, a court must (1) review the submission agreement and determine that the 'arbitrator's award covers areas not contemplated by the submission agreement,' or (2) determine that the award is 'without foundation in reason or fact.'"[5] The court will examine each of these two grounds in turn.

A. The Arbitrator Did Not Exceed His Powers.

The first way to show that an arbitrator exceeded his powers involves comparing the arbitration award with the arbitration agreement. Courts review the agreement "and determine whether the arbitrator's award covers areas not contemplated by the submission agreement" or, stated differently, "whether the arbitrator exceeded the powers delegated to him by the parties."[6]

The arbitration agreement here grants exceedingly broad authority to the arbitrator. It recites the minority shareholder plaintiffs' and Behnken parties' "desire to resolve by the procedure set forth herein all actual or potential claims that either of them (or any affiliated business entity) may have against the other (or any affiliated business entity), all of which issues are hereafter referred to as the 'Youngs / Behnken Controversy.'"[7] This sweeping language

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[4]Utah Code Ann. § 78-31a-124(1)(d) (2002).

[5]*Softsolutions, Inc. v. Brigham Young Univ.*, 1 P.3d 1095, 1100 (Utah 2000) (quoting *Buzas*, 925 P.2d at 950).

[6]*Buzas*, 925 P.2d at 949 (quotation marks omitted).

[7]Mem. in Supp. of Pls.' Mot. to Confirm Arbitration Award (Doc. # 54), Ex. A., at 1 (hereinafter "Arbitration Agreement").

brought all conceivable disputes between the minority shareholder plaintiffs, the Behnken parties, and any of their affiliated business entities — not just those specifically related to ANI, the named business entity that is a party in this case — within the arbitrator's purview.

The agreement also gave the arbitrator virtually unlimited discretion as to how he reached his decision. He could hire assistants, and the signing parties expressly waived objections to him doing so.[8] He had "complete discretion as to the procedures to be followed in the arbitration," so long as the parties were "given an opportunity to submit their positions and any supporting documentation or evidence in writing."[9] And he could base his decision "on any evidence [he] chooses to rely upon, which may include but not be limited to financial records of ANI, financial records related to the Youngs / Behnken Controversy, and *any other evidence* provided by the Parties."[10]

The agreement states that the arbitrator could base his decision on factors "includ[]ing] but . . . not limited to assets of, and transfers among, the Behnken parties *and related companies they control*, as well as any capital contributions, advances, loans, etc. from or by any of the Behnken Parties or related companies."[11] It also provides that the decision would "set forth the value of the minority shares as of a date that [the arbitrator] determines to be appropriate under

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[8] *Id.* at 2, ¶ 4.

[9] *Id.* ¶ 5.

[10] *Id.* ¶ 7 (emphasis added).

[11] *Id.* ¶ 8 (emphasis added).

the circumstances"[12] and that ANI would "purchase all shares owned by the Minority Shareholders within thirty days"[13] at "the price established by the arbitrator."[14]

Given this virtually unlimited grant of authority, the defendants' claims that the arbitrator exceeded his authority are simply implausible. The way the arbitrator reached his decision, the factors upon which it was based, and the result the decision mandates (buying the minority shares) all fall comfortably within the arbitrator's contractual authority.

The defendants' most plausible argument that the arbitrator exceeded his authority relates to the decision's timing. The agreement states that the decision should have been rendered "no later than the week of October 17, 2005."[15] The arbitrator, however, did not issue his decision until about ten weeks later — December 30, 2005 — and did not sign it until January 18, 2006.[16] At first blush, these facts arguably show a timeliness issue. The defendants' actions, however, demonstrate that they were comfortable with the pace of decisionmaking. Specifically, Jack Behnken and Ron Haws met with the arbitrator on Sunday, October 30, 2005. Nothing in the record indicates that they objected to this meeting even though it clearly was outside the specified deadline. Instead, the record shows that the parties were actively working with the arbitrator during the months of November and December — even though the October 17 deadline had long

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[12]*Id.* ¶ 9.

[13]*Id.* ¶ 10.

[14]*Id.* at 1.

[15]*Id.* at 2, ¶ 6.

[16]Mem. in Supp. of Pls.' Mot. to Confirm Arbitration Award (Doc. # 54), Ex. H., at 1 (hereinafter "Decision").

since passed — to help him reach his decision.[17] And the Behnken parties, including the children, did not object after the court granted the December 15, 2005, joint motion to continue the stay, which was filed for the express purpose of permitting the arbitration to conclude.

There is no indication that any party objected to the untimeliness of the award until *after* it was delivered on December 30. Under Utah law, such objections are untimely. By statute, "[a] party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator *before* receiving notice of the award."[18] The obvious rationale for this rule is to avoid creating an illusory arbitration, in which a disappointed party can simply cry "out of time" as a basis for vacating a disappointing award. As the Utah Supreme Court said in a similar case, "having permitted the proceedings to go forward to conclusion without lodging a protest, [the defendants are] deemed to have waived any objection of timeliness."[19] And it is of no consequence that the arbitrator did not sign the award until January 18, 2006, after he received post-December 30 objections. Under Utah law, "an arbitration award will not be disturbed on account of irregularities or informalities. Failure to comply with procedural requirements such as the signature requirement is an irregularity and as such cannot by itself support appellate intervention."[20]

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[17] *See id.* Ex. E & F.

[18] Utah Code Ann. § 78-31a-120(2) (2002) (emphasis added).

[19] *Utility Trailer Sales of Salt Lake, Inc. v. Fake*, 740 P.2d 1327, 1331 (Utah 1987).

[20] *Allred v. Educators Mut. Ins. Ass'n of Utah*, 909 P.2d 1263, 1265–66 (Utah 1996) (quotation marks and citation omitted).

Finally, the Behnken children argue that the award must be vacated because they were never given an opportunity to submit evidence to the arbitrator. This contention is unfounded. Each of the Behnken children signed the arbitration agreement on May 26, 2005. The arbitration decision was not rendered until December 30, 2005, more than seven months later. During that time, their father met with the arbitrator and presented evidence in support of their unified position. Had they so desired, the children could have submitted additional evidence to the arbitrator at any time during those seven months. That they chose not to do so does not mean that they were in any way denied the opportunity to do so or that the arbitrator exceeded his powers.

The Behnken children also claim that they were "without notice" of the arbitration proceedings. This claim defies credence, as they were well aware of what was transpiring. One of many indications of this fact is a motion filed with this court on December 15, 2005, requesting a further stay of proceedings. That motion — though filed by the attorneys for defendant American Nutrition — represented that all parties, including specifically the Behnken children,[21] were requesting a continued stay of the proceedings so that the arbitrator could complete his decision. Obviously, the children were fully aware of the arbitration.

In sum, the arbitrator did not exceed his powers in this case. He performed the task delegated to him (assigning a value to the minority shares and ordering their purchase) in a manner specifically allowed by the agreement. And though the arbitrator did not render his

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[21]Through some apparent typographical error, Sandi Behnken's name was omitted from the list of parties submitting the motion. John Behnken and William Behnken were both listed in the motion. Since the children had not at that point secured separate counsel, the omission of Sandi's name appears to be an inadvertent oversight.

decision precisely within the time specified, the parties waived any objection to the award's timeliness because they did not object before the arbitrator released his decision.

B. The Award Is Not Without Foundation in Reason or Fact.

The second way to prove that an award should be vacated is to show that it is "completely irrational."[22] "In other words, an award may not stand if it does not meet the test of fundamental rationality."[23] "[I]n considering" whether an arbitrator exceeded his authority in this way, "courts must approach this allegation cautiously, for, although the complete irrationality of an award is a basis for setting it aside, the irrationality principle must be applied with a view to the narrow scope of review in arbitration cases."[24]

A plain reading of the arbitration agreement reveals that the award in this case was rational. The agreement explicitly gave the arbitrator authority to value the minority shares based "on any evidence [he] chooses to rely upon, which may include but not be limited to financial records of ANI, financial records related to the Youngs / Behnken Controversy, and any other evidence provided by the Parties."[25] The Youngs / Behnekn Controversy, of course, included "all actual or potential claims that either of them (*or any affiliated business entity*) may have against the other (*or any affiliated business entity*)."[26] Thus, even if the arbitrator based his decision in

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[22]*Buzas*, 925 P.2d at 950 (quotation marks omitted).

[23]*Id.* (quotation marks omitted).

[24]*Id.* (quotation marks omitted).

[25]Arbitration Agreement, at 2 ¶ 7.

[26]*Id.* at 1.

part on financial data from other companies with which the plaintiffs or the defendants were involved, he had contractual authority to do so. The award therefore was not irrational.

II. The Award Should Be Modified to Reflect the Proper Ownership Percentage at Stake.

In addition to arguing that the award should be vacated, plaintiffs also argue that it should be modified. The statutory grounds for modifying an arbitration award are found in Utah Code Ann. § 78-31a-125. The specific ground invoked here is that the arbitrator made "an evident mistake in the description of . . . property referred to in the award."[27] The defendants claim that the award incorrectly orders ANI to purchase 12.75% of its minority ownership rather than the 11.45% minority ownership owned by the plaintiffs and specified in the agreement.

The plaintiffs admit that the arbitrator's decision "should be modified by the Court to reflect an amount proportionate to 11.45% (the total of shares owned by the plaintiffs)."[28] This modification would reduce the amount ANI must pay from $7,514,679 to $6,748,476.57.

Based on this admission and record evidence, the court finds that a condition for modification under § 78-31a-125(1)(a) exists because the arbitrator made an evident mistake in the proper description of the property referred to in the award. The correct ownership percentage at stake was 11.45%, not 12.75%. The court therefore MODIFIES the award and reduces to $6,748,476.57 the amount ANI must pay for the plaintiffs' 11.45% ownership interest. This error

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[27]Utah Code Ann. § 78-31a-125(1)(a) (2002).

[28]Pls.' Mem. in Opp'n to Mots. of American Nutrition, Inc., Jack Behnken, and Nancy Behnken to Vacate Arbitration Award & Reply Mem. in Supp. of Pls.' Mot. to Confirm Arbitration Award (Doc. # 77-1), at 26 (Apr. 13, 2006).

was, however, merely a computational error, and does not undermine the arbitrator's decision as a whole.

CONCLUSION

The court MODIFIES the arbitration award to reflect that the plaintiffs' ownership interest of ANI is 11.45%, not 12.75%. ANI must therefore pay $6,748,476.57 for plaintiffs' shares, not the greater dollar value specified in the award. The court CONFIRMS the award in all other respects. As such, the pending motions to vacate and confirm (# 53, 62, 65, 68) are all GRANTED IN PART and DENIED IN PART. The court DENIES AS MOOT the motion to strike the declaration of Ron Haws (# 74); this declaration played no part in the court's decision. The court also DENIES the Behnken Children's motion for attorney fees, as no good cause has been shown given the disputes that have arisen in this case (# 83).

SO ORDERED.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JAMES MORGAN FITTS Defendant.	)	Case No. 1:05-CR-154 TS **CONSENT TO ENTRY OF PLEA OF GUILTY BEFORE THE MAGISTRATE JUDGE AND ORDER OF REFERENCE**

Pursuant to 28 U.S.C. § 636(b)(3), the defendant, JAMES MORGAN FITTS, after consultation and agreement with counsel, consents to United States Magistrate Judge David Nuffer accepting defendant's plea of guilty and to the Magistrate Judge conducting proceedings pursuant to Rule 11 of the Federal Rules of Criminal Procedure. The defendant also acknowledges and understands that sentencing on his plea of guilty will be before the assigned District Judge after a pre-sentence investigation and report, and compliance with Fed.R.Crim.P. 32.

The United States, by and through the undersigned Assistant United States Attorney, consents to the Magistrate Judge conducting plea proceedings pursuant to Fed.R.Crim.P. 11, and accepting the defendant's plea of guilty as indicated above, pursuant to such proceedings.

DATED this 1st day of ~~July~~ August 2006.

Defendant

Attorney for Defendant

Assistant United States Attorney

ORDER OF REFERENCE

Pursuant to 28 U.S.C. § 636(b)(3), and the consent of the parties above mentioned, including the defendant,

IT IS HEREBY ORDERED that United States Magistrate Judge David Nuffer shall hear and conduct plea rendering under Fed.R.Crim.P. 11, and may accept the plea of guilty from the defendant pursuant thereto after full compliance with Fed.R.Crim.P. 11.

DATED this 20th day of July, 2006

BY THE COURT:

Ted Stewart
United States District Judge

FILED
U.S. DISTRICT COURT

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DISTRICT OF UTAH
BY: ______
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

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EMPLOYERS MUTUAL CASUALTY COMPANY, assignee of ROCKY MOUNTAIN CONCRETE PUMPING L.L.C. and MESSERLY, L.C.	)	Case No. 1:05CV4 DS
Plaintiff,	)	
vs.	)	ORDER RE: PREPARATION OF JURY INSTRUCTIONS, VERDICT FORM, MOTIONS IN LIMINE, AND REQUESTS FOR VOIR DIRE EXAMINATION
COLORADO CASUALTY INSURANCE COMPANY,	)	
Defendant.	)	

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This order shall supplement DUCivR 47-1 and 51-1, and shall, in all cases, be followed unless otherwise ordered by the court.

JURY INSTRUCTIONS

All proposed jury instructions, except preliminary instructions, are required to be filed and served at least seven days before the trial begins, except for an isolated one or two instructions whose need could not have been foreseen. The court has adopted its own standard preliminary jury instructions and certain stock post trial jury instructions, copies of which counsel may obtain from

the court prior to trial. The court, unless it orders otherwise, will give its standard preliminary instructions to the jury at the commencement of the trial. Proposed final jury instructions are to be submitted according to the following procedure:

(a) The parties are required to jointly submit one set of agreed upon final instructions. To this end, the parties are required to serve their proposed instructions upon each other two weeks prior to trial. The parties should then meet, confer and submit one complete set of agreed upon instructions, which should include the court's stock post trial jury instructions where applicable.

(b) If the parties cannot agree upon one complete set of final instructions, they are required to submit one set of those instructions that have been agreed upon, and each party should submit a supplemental set of instructions which are not agreed upon.

(c) It is not enough for the parties to merely agree upon the general instructions, and then each submit their own set of substantive instructions. The parties are expected to meet, confer, and agree upon the substantive instructions for the case.

(d) These joint instructions and supplemental instructions must be filed one week prior to trial. Each party should then file, two days before trial, its objections to the non-agreed upon instructions proposed by the other party. Any and all objections shall be in writing and shall set forth the proposed instruction in its entirety. The objection should then specifically set forth, or highlight, the objectionable material in the proposed instruction. The objection shall contain citation to authority explaining why the instruction is improper and a concise statement of argument concerning the instruction. Where applicable, the objecting party shall submit an alternative instruction covering the subject or principle of law.

(e) The parties are required to submit the proposed joint set of instructions and proposed supplemental instructions in the following format:

(i) There must be two copies of each instruction;

(ii) The first copy should indicate the number of the proposed instruction, and the authority supporting the instruction; and

(iii) The second copy should contain only the proposed instruction--there should be no other marks or writings on the second copy except for a heading reading "Instruction No. ___" with the number left blank.

(f) On the day of trial, the parties may submit a concise written argument supporting the appropriateness of each party's proposed instructions to which the other party objected.

(g) All instructions should be short, concise, understandable, and neutral statements of law. Argumentative or formula instructions are improper, will not be given, and should not be submitted.

(h) Any modifications of instructions from statutory authority, Devitt and Blackmar, or any other form instructions must specifically state the modification made to the original form instruction and the authority supporting the modification.

SPECIAL VERDICT FORM

Any proposed special verdict form is also required to be filed and served at least seven days before trial begins. Where relevant, the procedure outlined in (a)-(h) above will also apply to special verdict forms.

MOTIONS IN LIMINE

All motions in limine are to be filed with the court at least seven days before trial begins, unless otherwise ordered by the court.

REQUESTS FOR VOIR DIRE EXAMINATION

Any special request for voir dire examination of the jury panel regarding the prospective jurors' qualifications to sit, including the specific questions to be put before prospective jurors, shall be submitted in writing to the court and served upon the opposing party or parties at least seven days prior to the time the case is set for trial, unless the court's examination furnishes grounds for additional inquiry. Where relevant, the procedure outlined in (a)-(h) above will also apply to requests for voir dire examination.

Failure to comply with this Order may subject the non-complying party and/or its attorneys to sanctions.

The Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

IT IS SO ORDERED.

DATED: August 9, 2006

DAVID SAM
SENIOR JUDGE
U.S. DISTRICT COURT

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

ROGER JACKMAN, Defendant-Petitioner, vs. UNITED STATES OF AMERICA, Plaintiff-Respondent.	ORDER GRANTING GOVERNMENT MOTION FOR EXTENSION OF TIME Case No. 1:05-CV-00151 PGC

The court GRANTS the government's Motion for Extension of Time (#3), and orders the United States to file a response to the defendant-petitioner's motion for relief pursuant to 28 U.S.C. § 2255, on or before October 9, 2006.

SO ORDERED.

DATED this 9th day of August, 2006.

Paul G. Cassell
United States District Judge

STEVEN B. KILLPACK, Federal Defender (#1808)
VANESSA M. RAMOS, Assistant Federal Defender (#7963)
Utah Federal Defender Office
46 West Broadway, Suite 110
Salt Lake City, Utah 84101
Telephone: (801) 524-4010

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL BRADFORD, Defendant.	**ORDER GRANTING WITHDRAWAL OF COUNSEL** Case No. 1:06CR00015TS

This matter came before the Court on a Motion to Withdraw filed by Vanessa M. Ramos, Assistant Federal Defender.

IT IS HEREBY ORDERED:

Vanessa M. Ramos, Assistant Federal Defender, is hereby granted leave to withdraw as counsel of record for the Defendant.

DATED this 09th day of , 2006.

BY THE COURT:

Brooke C. Wells

BROOKE C. WELLS
United States Magistrate Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UTAH ENVIRONMENTAL CONGRESS, Plaintiff, vs. DALE BOSWORTH, as Chief of the Forest Service; UNITED STATES FOREST SERVICE; MARY ERICKSON, as Supervisor of the Fishlake National Forest; and MARVIN TURNER, Loa District Ranger, Defendants.	ORDER VACATING APPROVAL OF THE PROJECT Case No. 2:02-CV-00321 PGC

As instructed by the United States Court of Appeals for the Tenth Circuit,[1] the court hereby VACATES the Forest Service's approval of the Thousand Lakes Community Forestry Initiative Project.

[1]*See Utah Environmental Congress v. Bosworth*, 439 F.3d 1184, 1187 (10th Cir. 2006).

The court also ORDERS the parties to submit a joint status report within twenty (20) days of the date of this order and inform the court of any plans to proceed in this case or whether a further remand to the Forest Service or other action might be appropriate .

SO ORDERED.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ANNABEL IVIE, for and on behalf of her father, DONALD P. HANSEN, deceased, Plaintiff, vs. VETERAN'S ADMINISTRATION and the UNITED STATES OF AMERICA, Defendants.	ORDER DIRECTING SETTLEMENT SATISFACTION Case No. 2:03-CV-00206 PGC

Plaintiff Annabel Ivie filed this case back in February 2003, asserting federal tort claims for medical malpractice claims against the Veteran's Administration and the United States. Both parties agreed to a schedule which included a five-day jury trial beginning on August 29, 2005. After some attempts at settlement, the parties then submitted a stipulated scheduling report that included a bench trial beginning on May 15, 2006.

After mid-September 2005, the court received no pleadings from either counsel on this case. Around the end of March 2006, counsel then contacted the court to inform the court that a settlement agreement had been concluded by the parties and the court would receive dismissal papers shortly. It has now been almost five months since the court received communications indicating the matter had been resolved and that the case would be closed shortly. Indeed, the

court's law clerk has regularly called both counsel to request the agreed-upon dismissal papers, but both have repeatedly informed him that "a little bit more time would be needed."

Instead of papers closing this case, however, the court has just received a motion to enforce the settlement agreement filed by Ms. Ivie [#30]. Ms. Ivie requests that the court enter an order enforcing the agreed-upon settlement agreement signed back on March 24, 2006. Ms. Ivie states that although both sides came to an agreement, she has not received the payment requested by the terms of that agreement.

The court believes that counsel from both side will adequately resolve this issue within the next three weeks. Accordingly, the court will grant counsel a grace period of three weeks until August 29, 2006. On August 30, 2006, if compensation of $107,500 has not been wired and confirmed into Ms. Ivie's counsel's client trust account, the court orders counsel from both sides to meet at 4:00 P.M. at the courthouse. At that time, the Veteran's Administration counsel is ordered to hand over to plaintiff's counsel a certified cashier's check of $107,500 (the stipulated "Settlement Payment") to be placed into Ms. Ivie's counsel's client trust account. Both counsel are then ordered to provide their signatures on the stipulated dismissal documents (which Ms. Ivie's counsel is ordered to prepare for that day) to close this case and to file those documents with the court. Since the court has already provided numerous extensions to the parties and has already canceled two trial dates as well, the court will not entertain any further extensions of this order absent extraordinarily good cause shown.

If the parties desire an alternate solution, the court is willing to entertain any such *stipulated* motions which will resolve and close this case by August 29, 2006. Absent any such stipulated motions, the court looks forward to a resolution of this long-running case by then.

SO ORDERED.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

Robert Wing (#4445)
Katherine Norman (#9573)
HOLLAND & HART LLP
60 E. South Temple, Suite 2000
Salt Lake City, UT 84111-1031
Telephone: 801.595.7830
Facsimile: 801.364.9124

Attorney for Robert G. Wing
Receiver for 4Nexchange, L.L.C.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

ROBERT G. WING, Receiver for 4NExchange, L.L.C. Plaintiff, vs. MILLENIUM ASSET MANAGEMENT, INC., BRUCE COLES, PETER ZACCAGNINO and GIGI ZACCAGNINO, Defendants.	**ORDER APPROVING SETTLEMENT** Case No. 2:03CV00506 Judge Dale A. Kimball

Based upon the Motion to Approve Settlement and the memorandum in support thereof and good cause appearing therefore, it is hereby ORDERED that:

1. The Settlement Agreement entered into by Plaintiff, Robert G. Wing, Receiver for 4NExchange, LLC, and Bruce Coles ("Coles") and Russell Robinson ("Robinson is approved; and

2. Within thirty (30) days of written notification from the Receiver that the Court has approved the Settlement Agreement, Coles and Robinson will collectively pay the sum of twenty-five thousand dollars ($25,000) to the Receiver; and

3. Within forty-five (45) days thereafter, Coles and Robinson will collectively pay an additional sum of fifty thousand dollars ($50,000.00) to the Receiver; and

4. Within forty-five (45) days thereafter, Coles and Robinson will collectively submit the final payment of fifty thousand dollars ($50,000.00) to the Receiver; and

5. Upon receiving the final installment of the agreed upon sum, the Receiver will move to dismiss the case pending against Bruce Coles.

DATED this 9th day of ~~July,~~ August, 2006.

Dale A. Kimball

Honorable Dale A. Kimball
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MICHAEL GRANIERI, Plaintiff, v. **BRUCE BURNHAM, M.D., ET AL.,** Defendants.	**MEMORANDUM DECISION AND ORDER** Case No. 2:03CV771DAK

This matter is before the court on Defendants' Motion for Summary Judgment and Motion to Strike. The court held a hearing on the motion on August 1, 2006. Plaintiff was represented by Budge W. Call, and Defendants were represented by William F. Hanson. Having fully considered the motion, memoranda, affidavits, and exhibits submitted by the parties and the facts and law relevant to this motion, the court enters the following Memorandum Decision and Order.

BACKGROUND

This court previously described the events leading up to this lawsuit in its April 28, 2004 Memorandum Decision and Order. Few facts have changed. Plaintiff, Michael Granieri, was an inmate at the Central Utah Correction Facility ("CUCF") in Gunnison, Utah. In March 2002, he began having severe abdominal pains, along with diarrhea and vomiting, and was seen by the

physicians, physicians assistants, and nursing staff at the facility's infirmary. Plaintiff's conditions continually worsened over the next six to eight weeks and he lost between twenty-five to thirty pounds before his condition was properly diagnosed. At one point, he was also prescribed a steroid-based medication that reportedly helped while he was taking it. However, after the medication was discontinued his symptoms returned.

On May 6, 2002, Plaintiff was transferred to the Draper facility and was treated at the facility's infirmary. Plaintiff felt something burst inside his stomach. He called to the staff for help and was told to "shut up and leave us alone." On May 8, 2002, Plaintiff was transported to the University of Utah Medical Center's emergency room. Upon arrival, Plaintiff was diagnosed with peritonitis and a working diagnosis of a ruptured appendix. Plaintiff underwent surgery the next day. Plaintiff's appendix was removed, twelve to eighteen inches of his intestines were removed, and a four inch section of his colon was removed. Plaintiff's diagnosis was Crohn's disease with secondary small bowel perforation. Plaintiff lost his distal ileum, which prevents him from absorbing bile salts and necessitates the need for cholestyramine, his terminal ileum will never "grow back," and he has chronic diarrhea which will cause some degree of disability.

Plaintiff was discharged from the University of Utah Medical Center on May 20, 2002 to the Utah State Prison and returned to the CUCF on May 28, 2002. Plaintiff was prescribed Chlorestyramine and Pentasa and told to eat a bland diet to help with the Crohn's disease. Plaintiff was also given literature about Crohn's disease and dietary information. When he returned to CUCF, the doctors substituted Sulfasalazine for the Pentasa, the information on Crohn's disease was taken away from him, and no special diet was allowed.

DISCUSSION

Defendants' Motion for Summary Judgment

This is Defendants' second motion for summary judgment. As in their first motion, Defendants argue that Plaintiff cannot establish an Eight Amendment claim for cruel and unusual punishment as a matter of law and, therefore, they are entitled to qualified immunity on his claims.

A. Cruel and Unusual Punishment

"When prison officials are deliberately indifferent to an inmate's serious medical needs, they violate the inmates right to be free from cruel and unusual punishment." *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996). Therefore, to establish an Eighth Amendment claim, an inmate must show that his medical needs were serious and that prison officials were deliberately indifferent to those needs. *Id.*; *Olsen v. Stotts*, 9 F.3d 1475, 1477 (10th Cir. 1993) (to prove a violation of the Eight Amendment for failure to provide medical care "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.").

Defendants argue that this case is similar to case of *Self v. Crum*, 439 F.3d 1227 (10th Cir. 2006). In *Self*, the prison doctor misdiagnosed the inmates condition because the inmates symptoms were vague and nonspecific. When the doctor realized that further treatment was necessary, he sent the inmate to the hospital. The court found that the facts in that case did "not show a conscious disregard of Self's medical needs." *Id.* at 1234. The court explained that where a doctor "faces symptoms that could suggest either indigestion or stomach cancer, and the doctor mistakenly treats indigestion, the doctor's culpable state of mind is not established," and

"that "a treating physician's failure to connect-the-dots is by itself insufficient to establish a culpable state of mind." *Id.* at 1235-36.

This case, however, is not merely a misdiagnosis case. In *Self*, the doctor sent the inmate to the hospital for further treatment. In this case, defendants allowed Plaintiff's condition to worsen over the course of six to eight weeks before sending him to the hospital. Plaintiff may also have suffered from vague symptoms but the medical staff knew that it was gastrointestinal. Given their failure to diagnose the problem, the delay in sending Plaintiff to the hospital was significant. And, in some instances, Plaintiff was denied access to the nurses and doctors at the prison. He was also told that his ailments were only in his head even though, at times, his condition caused him to curl up in a fetal position or lose consciousness. The day before he was taken to the hospital, and six to eight weeks after the symptoms began, Doctor Roberts claimed that Plaintiff was guarded and factitious. There are substantial differences between this case and *Self.*

Nothing in the *Self* case causes this court to change its previous ruling. In addition, nothing in the additional affidavits warrant a reconsideration of the court's prior ruling. This court has already fully analyzed the issue of deliberate indifference and there remain questions of fact with respect to the issue. On summary judgment, this court must consider the evidence and all reasonable inferences drawn therefrom in the light most favorable to Plaintiff. Plaintiff has raised sufficient facts that would support a finding that Defendants knew he faced a substantial risk of harm and disregarded that risk by failing to take reasonable measures to abate it and, therefore, that the issue of deliberate indifference should be presented to a jury. The court also finds that there are adequate affirmative links with each of the medical personnel who treated

Plaintiff for the case to go forward as to each of the Defendants.

B. Qualified Immunity

Defendants further argue that this court did not fully analyze the issue of qualified immunity in its previous summary judgment ruling. Defendants now argue that the court did not consider whether the Defendants' actions were objectively reasonable conduct. Unlike the *Self* case, however, this court cannot conclude as a matter of law that Defendants' conduct was objectively reasonable. Qualified immunity cannot protect Defendants when there are questions of fact as to whether Defendants were deliberately indifferent to the serious medical needs of Plaintiff. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1317 (10th Cir. 2002). Plaintiff has met his burden of presenting evidence sufficient for his case to go to a jury. Accordingly, Defendant's motion for summary judgment is denied.

Plaintiff's counsel requested that he be paid for his fees in responding to this subsequent motion for summary judgment. Although a court can modify a decision at any time before entering final judgment, Defendants' motion did not raise anything new. The court, therefore, agrees with Plaintiff that he should be compensated, at least in part, for the unnecessary expense in responding to Defendants' motion. Plaintiff's counsel shall submit his requested fees within ten days of the date this Order.

Defendants' Motion to Strike

Defendants move to strike certain portions of the affidavits and declarations submitted by Plaintiff's in opposition to Defendants' first motion for summary judgment. These affidavits and declarations were filed in March of 2004. Defendants did not object to these affidavits in connection with the first motion for summary judgment. Therefore, the affidavits and

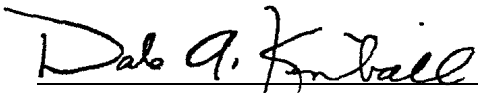
declarations could be considered by the court.

To the extent that Plaintiff is again relying upon these affidavits and declarations in his opposition to Defendants' second motion for summary judgment, Plaintiff asserts that they are already a part of the evidence in this case. Whether or not they are a part of the evidence in this case, the portions Defendants attack are either irrelevant to the court's decision or are established through other means. Therefore, the motion to strike is moot.

CONCLUSION

Based on the above reasoning, Defendants' Motion for Summary Judgment is DENIED and Defendants' Motion to Strike is MOOT. Plaintiff's counsel shall submit his requested fees within ten days of the date this Order.

DATED this 9th day of August, 2006.



DALE A. KIMBALL
United States District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ELMER LYNN WEST, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	ORDER DENYING MOTION FOR POST-CONVICTION RELIEF Case No. 2:06-CV-00589 PGC

This case is plaintiff Elmer Lynn West's second attempt to obtain post-conviction relief. His first attempt, *West v. United States of America*, case number 2:05cv00862 PGC in this district, was closed on February 28, 2006. The court denied his motion for relief in that case.[1]

Before the court may entertain a second motion for post-conviction relief, the defendant must comply with the applicable statutory requirements. In 28 U.S.C. § 2255, Congress set forth those requirements as follows:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have

[1] *See* Docket #7, *West v. United States of America*, Case No. 2:05-cv-00862 (D. Utah filed Feb. 28, 20006).

> found the movant guilty of the offense; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[2]

Mr. West has not provided the requisite certification from the Tenth Circuit. As such, the court may not entertain his second motion for post-conviction relief. The court therefore DENIES his motion (# 1). The clerk's office is directed to close the case.

SO ORDERED.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

[2]28 U.S.C. § 2255.

DAVID V. FINLAYSON (6540)
ATTORNEY FOR DEFENDANT
43 East 400 South
Salt Lake City, Utah 84l11
Telephone: (801) 220-0700
Facsimile: (801) 364-3232

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	:	ORDER
Plaintiff,	:	
	:	
vs.		Case No. 2:04 CR 708 JTG
	:	
FILIBERTO VALDOVINOS,	:	District Judge J. Thomas Greene
Defendants.	:	

TO: Chief Jerry Cook, Weber County Jail;

This Court hereby ORDERS the Weber County Jail immediately make arrangements for a licensed psychiatrist to evaluate the Defendant for any therapy and medications needed. It is further ORDERED that such medication be available within five days from the date of this order.

Dated this 9th day of August, 2006.

J. Thomas Greene

HONORABLE J. THOMAS GREENE
United States District Court Judge

Approved as to form:
Assistant United States Attorney Vernon Stejskal was contacted and telephonically approved the above order as to form.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

PANDA EXPRESS, INC., a California Corp. Plaintiff, vs. EXCEL CONSTURCTION, L.C., a Utah LLC, Defendant.	Case No. 2:04 cv 579 TS ORDER PERMITTING PANDA EXPRESS TO FILE A SUR-RESPONSE Judge Ted Stewart Magistrate Judge Brooke C. Wells

Plaintiff, Panda Express, seeks to strike alleged new arguments/evidence raised in Excel's reply memoranda, or in the alternative, Panda seeks an opportunity to file a sur-response.[1]

Having considered Plaintiff's arguments the court hereby GRANTS Panda's request to file a sur-response. Panda is to file any sur-response by August 18, 2006.

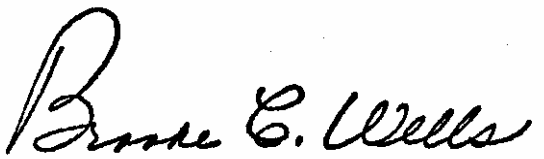
It is further ORDERED that Defendant may file a sur-reply to Panda's sur-response by August 25, 2006.

Accordingly, Panda's Motion to Strike is GRANTED in part. The court declines to strike the Affidavit of Loren E. Weiss, but, the court permits both parties to each file one additional memorandum following which, this court will hear oral argument on the Motion for Attorney

[1] Docket no. 81.

Fees.

DATED this 9th day of August, 2006.



Brooke C. Wells
United States Magistrate Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

LYNN ROGERS, Plaintiff, vs. ANDRUS TRANSPORTATION SERVICES, Defendants.	ORDER DISMISSING CASE WITHOUT PREJUDICE Case No. 2:04-CV-00994 PGC

Plaintiff Lynn Rogers filed a 42 U.S.C. § 12101 complaint against defendant Andrus Transportation Services on October 26, 2004. On December 2, 2005, the court amended the scheduling order setting deadlines for discovery – March 3, 2006, any motions – April 28, 2006, and a five day jury trial set for September 11, 2006. After that filing, the court received no further filings from the parties. On June 22, 2006, concerned about maintaining the trial date as scheduled, the court ordered the parties to provide a joint status report on the parties' intention to proceed. The parties' joint status report indicated that the parties had only filed the required initial disclosures and conducted partial initial written discovery over the past two years since filing. Apparently, Mr. Rogers had been incarcerated in the state of Texas since the inception of this case, thereby delaying the matter "somewhat." The report further indicated the unlikelihood that Mr. Rogers would be released by the September trial date.

The court received the parties status report and Mr. Rogers then filed a motion to continue the trial date scheduled for September 11, 2006 [# 17]. The motion to continue the trial date indicates that, in March 2004, Mr. Rogers retained his attorney to represent him before the Equal Employment Opportunity Commission and for this lawsuit. On July 29, 2004, Mr. Rogers received his Notice of Right to Sue letter from the EEOC. The state of Texas then incarcerated Mr. Rogers on criminal charges. Given a 90-day deadline on a Notice to Sue Letter, Mr. Rogers' counsel waited until October 26, 2004, the eighty-ninth day, to file Mr. Rogers' lawsuit.

Mr. Rogers represented to his counsel that he would be released around December 2004. He then indicated that he would be released in the spring of 2005. The parties began their initial discovery because Mr. Rogers believed he would be eligible for release in October 2005. The parties agreed to a stipulation because they believed this would be sufficient time for Mr. Rogers to be released. The parties never informed the court of this or any other stipulation. Mr. Rogers' official release date is on June 5, 2007, but he believes that he will be eligible for early release in September 2006. Given Mr. Rogers' previous representations of his release date, the court finds it difficult to plan based on Mr. Rogers' guess as to his release date.

Mr. Rogers argues that a continuance of the trial date is appropriate for several reasons. He argues that he has been diligent in requesting a continuance; that the continuance would accomplish the purpose for which the parties need the continuance; that there would be no inconvenience to the opposing party, its witnesses and the court from the continuance; and that Mr. Rogers would be harmed if the court denied the requested continuance. Defendant Andrus Transportation Services opposes the trial date continuance, as it is willing to proceed with trial or

to preserve Mr. Rogers' testimony through deposition. Furthermore, Andrus Transportation states that it seeks a speedy end to this litigation or, in the alternative, an order from the court dismissing this case without prejudice to refile once Mr. Rogers actually does leave prison.

The court notes that the parties have failed to previously inform it of difficulties with discovery, and the parties previously failed to inform the court of Mr. Rogers' status as a resident of the Texas penal system. Indeed, the parties did not provide any of this information to the court until the court requested information from the parties. Had the court known of these difficulties earlier, of course, dealing with them would have been simpler.

On the diligence front, Mr. Rogers argues that he has exercised all of the diligence possible by waiting to the very end of the 90-day right to sue period and the 120-day service of process deadline "hoping to be released from incarceration without delay to this proceeding. Thereafter, when it appeared that his release would not occur in time, Plaintiff made Defendant aware early in the litigation of his predicament. . . . Plaintiff has not taken any action as to unduly prolong or hinder these proceedings."[1] It is noteworthy, however, that Mr. Rogers never informed the court of his circumstances until almost two years after he had been incarcerated. Indeed, the court had to contact the parties to understand why the parties had failed to follow the scheduling deadlines. Although Mr. Rogers may have been diligent with his filing deadlines, it does not appear he has been so diligent in considering the court's calendar.

Mr. Rogers also argues that "a continuance is proper and useful in these circumstances in

[1] Pl's Memo. in Supp. of Mot. to Continue Trial Date, Docket No. 17, at 3 (July 12, 2006).

that it is logistically impossible for Plaintiff to properly prosecute his claim so long as he remains incarcerated."[2] Given his alleged "currently anticipated release date of September 2006,"[3] an extension would be in the best interests of Mr. Rogers. Mr. Rogers has, however, also clearly anticipated release dates of December 2004,[4] Spring of 2005,[5] and October 2005,[6] probably among others. Yet Mr. Rogers remains incarcerated, and the Texas jail facility indicates that Mr. Rogers official release date will not be until June 5, 2007.[7] Therefore, an extension of the trial date for 120 days, from September 11, 2006, until January 9, 2007, will not be even close to the official release date of Mr. Rogers. Mr. Rogers would actually need a 267-day extension from the original trial date to his official release date, and even then it is unlikely that he would be ready for trial. Consequently, a 90- to 120-day extension of the original trial date would be, given the state of Mr. Rogers' previously anticipated release dates, highly unlikely to result in any resolution of this case.

Mr. Rogers states that he is "unaware of any facts or circumstances which would suggest that any party to this proceeding, or the court, would be unduly inconvenienced by a

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[2] *Id*.

[3] *Id*.

[4] Brian L. Olson Affidavit at ¶ 5.

[5] *Id*. at ¶ 8.

[6] *Id*. at ¶ 9.

[7] *Id*. at ¶ 14.

continuance."[8] The court, however, has had this trial on its calendar for nearly two years. As a result, the court has had to schedule other hearings around this reserved trial time. Additionally, Andrus Transportation has indicated that it is ready for trial and that it desires a speedy end to this litigation. A continuance, when the court has kept this schedule for the past two years and the defense is clearly ready to begin trial, is thus inconvenient both to the court and to the defense.

Finally, Mr. Rogers argues that "the need for a continuance is quite obvious in that Plaintiff simply cannot properly prosecute his claims from a Texas jail cell. The logistics of arranging trial while Plaintiff is incarcerated appear impossible. Furthermore, any suggestion to a jury pool that Mr. Rogers is incarcerated would unduly prejudice his claims. Consequently, the effect of this court denying a continuance of a trial date effectively dismisses the Plaintiff's meritorious claims disallowing him his date in court on the issues."[9] The court is not convinced by these superficial assertions. For starters, none of these problems were brought to the court's attention in a timely fashion. Moreover, it is not clear why Mr. Rogers was unable to proceed with interrogatories, depositions, and other discovery in this case, much of which could have been handled by a simple telephone call to his attorney or perhaps a deposition in the Texas facilities. Mr. Rogers has not explained with any precision why his incarceration prevented these kinds of reasonable approaches. The court firmly agrees that a plaintiff should not lose any right to pursue a valid civil action simple by virtue of having been incarcerated. But it is equally the

[8] Pl's Memo., at 3-4.

[9] *Id*. at 4.

case that it is quite often possible pursue civil actions while incarcerated. If that was not the case here, Mr. Rogers has failed to explain why.

For all these reasons, it is not appropriate to extend the trial date. Accordingly, this case should be dismissed, without prejudice to refiling. Mr Rogers, in anticipation of the court's ruling, submitted a brief reply conceding that he "cannot be certain that he would be released by the currently scheduled September 2006, trial date. If Plaintiff cannot attend the trial, as scheduled, it is virtually impossible for him to properly prosecute his case."[10] He also stated that he would "stipulate to a dismissal, without prejudice, so long as Defendant waives any affirmative defense based upon the statute of limitations."[11] And Mr. Rogers contends that in Americans with Disabilities Act cases, the statutory filing period is not tolled when a complaint is dismissed without prejudice.

The court is not in a position to force the defendant to waive any affirmative defense or to rule any statute of limitations issues not before it. Apart from that, however, Mr. Rogers concession seemingly reveals an awareness that he has not been diligent in pursuing his case. As noted earlier, the court did not hear from Mr. Rogers or his counsel regarding his status or any perceived difficulties in prosecuting his case until prompted to do so by the court. It fell to the court to find out the status of the litigation, with a pending trial date set only two months away. Mr. Rogers and his counsel have not kept the court adequately informed of the status of his case, nor have they sought an extension in a timely manner given the court's scheduling of this matter.

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[10] Pl's Reply, Docket 20, at 1-2 (July 27, 2006).

[11] *Id*. at 2.

Accordingly, the court finds that dismissal without prejudice appropriate at this time, especially given that Mr. Rogers has stated that he will not be ready for trial date on September 11, 2006, a date scheduled more than two years ago. Mr. Rogers has had adequate time to prepare his case and has failed to do so, and the court is not willing to grant further extensions on the *possibility* that Mr. Rogers might leave incarceration soon.

Given Mr. Rogers' previous failure to inform the court in a timely fashion of his status or of his need for continuance, dismissal without prejudice is the most appropriate action. Due to this dismissal, the court DENIES Mr. Rogers' motion to continue the trial date [#17]. The Clerk's Office is directed to close this case.

SO ORDERED.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

THEODORE L. FISHER, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	ORDER REMANDING CASE TO THE COMMISSIONER Case No. 2:05CV00251 PGC

Plaintiff Theodore Fisher appeals the denial of his application for disability insurance benefits ("DIB"). He claims that the administrative law judge violated governing regulations and contravened Tenth Circuit precedent by failing to articulate the weight he gave to the opinion of Dr. John Nilsen, Fisher's treating physician, when denying Fisher's DIB application, and by failing to accord Dr. Nilsen's opinion any deference as 20 C.F.R. §§ 404.1527 and 416.927 require. While the judge's thorough opinion carefully reviewed many of the aspects of the case, the court agrees that the ALJ failed to state the weight he gave to Dr. Nilsen's opinion and failed to discuss whether he gave it any deference based on the factors in the relevant regulations. Because of this particular error, the court REMANDS for further proceedings.

STATEMENT OF FACTS

The narrow error in the ALJ's opinion is legal, not factual, and requires further administrative proceedings. As such, the court's recitation of facts will be brief.

Mr. Fisher applied for DIB in February 2002, alleging that he was unable to work since January 30, 2001, due to depression, post-traumatic stress disorder, attention deficit disorder, and neck problems. Before he was fired as Chief of Police in January 2001, Mr. Fisher had past work experience as a police officer, a security guard, a soldier, and an assistant for individuals with disabilities.

Mr. Fisher's DIB claim was denied initially and upon reconsideration. Mr. Fisher then requested and received a hearing before an ALJ, who issued a decision that found Mr. Fisher was not disabled. Fisher requested review of the ALJ's decision by the Appeals Council, which denied his request. The Appeals Council's denial is thus the final administrative decision in this case.

John Nilsen, D.O., was Mr. Fisher's treating physician between March 2000 and August 2003. Dr. Nilsen first diagnosed Fisher with depression and post-traumatic stress disorder. Six months later, Dr. Nilsen added a diagnosis of attention deficit disorder and changed Mr. Fisher's medications after he complained that his current medications were not working.

In October 2000, Mr. Fisher reported that he had been using too much Xanax and admitted himself to a hospital for two days for Xanax dependence. By March 2001, Mr. Fisher's Xanax dependence was in full remission. Mr. Fisher continued to see Dr. Nilsen during the next two years for short fifteen-minute medication reviews. Dr. Nilsen's diagnoses remained

consistent throughout that time, even as Mr. Fisher went through several major life events: drug rehabilitation for Xanax dependence, marital separation and divorce, a prison sentence for aggravated burglary, and the termination of his job.

On July 13, 2002, Dr. Nilsen completed a mental work capacity evaluation of Mr. Fisher. He opined that Fisher had moderate limitations in (1) understanding and remembering detailed instructions, (2) working with or in proximity to others without being distracted by them, (3) getting along with coworkers or peers without distracting them or exhibiting behavioral extremes, (4) responding to changes in the work setting, (5) being aware of normal hazards and taking appropriate precautions, and (6) traveling in unfamiliar places or using public transportation.

In addition to these limitations, Dr. Nielsen opined that Mr. Fisher had marked limitation in his ability to (7) carry out detailed instructions, (8) maintain attention and concentration for extended periods of time, (9) perform activities within a schedule, (10) maintain regular attendance and be punctual, (11) sustain an ordinary routine without special supervision, (12) complete a normal workday and work week without interruptions from psychologically based symptoms, (13) perform at a consistent pace with standard rest periods, (14) interact appropriately with the general public, and (15) set realistic goals. Dr. Nielsen also found that Mr. Fisher only had slight limitations in his ability to understand, remember, and carry out very short and simple instructions.

Dr. Nielsen ultimately concluded that Mr. Fisher had marked difficulties in (1) maintaining concentration, persistence, or pace, and (2) had three repeated episodes of decompensation, each of extended duration.

STANDARD OF REVIEW

This court reviews "'the Commissioner's decision to determine whether the factual findings are supported by substantial evidence and whether the correct legal standards were applied.'"[1] Here, Mr. Fisher concedes that his appeal relates to only "the question of whether the ALJ applied the correct legal standards in determining disability" and that "[t]he only standard of review to be applied is a determination of whether the ALJ applied the correct legal standards or made the correct legal conclusions based on his factual findings."[2] The court will therefore apply this standard.

I. The ALJ Erred By Failing to Make Clear What Weight He Assigned to the Opinion of Mr. Fisher's Treating Physician.

Recent Tenth Circuit precedent emphasizes that in disability social security cases, the opinion of an applicant's treating physician must play a central role in the ALJ's decision. As the circuit noted, "'[u]nder the regulations, the agency rulings, and our case law, an ALJ must give good reasons . . . for the weight assigned to a treating physician's opinion,' that are 'sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinions and the reason for that weight.'"[3] Because the ALJ failed to do so in this case, the court must remand for further proceedings.

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[1] *Robinson v. Barnhart*, 366 F.3d 1078, 1080 (10th Cir. 2004) (quoting *Angel v. Barnhart*, 329 F.3d 1208, 1209 (10th Cir. 2003)).

[2] Pl.'s Br. in Supp. of Pet. for Review (Doc. # 8), at 2.

[3] *Robinson*, 366 F.3d at 1082 (quoting *Watkins v. Barnhart*, 350 F.3d 1297, 1300 (10th Cir. 2003)).

The ALJ's discussion of Dr. Nilsen's opinion consists of only one paragraph, which states:

> The ALJ has carefully assessed the moderate and marked mental limitations assessed by Dr. Nilsen and finds his opinion is not supported by objective clinical findings, including his own findings on examination. Throughout his medication review notes (2001 – 2003), Dr. Nilsen reported the claimant was doing well with regard to the post traumatic stress disorder, attention hyperactivity disorder and depression. Further, Dr. Nilsen indicated the claimant had only slight limitations in his ability to understand, remember and carry out simple instructions which is not inconsistent with the residual functioning capacity outlined below; and, Dr. Nilsen did not preclude the claimant from engaging in work activity.[4]

The ALJ's analysis of Dr. Nilsen's opinion in this case, like the ALJ's decision in *Robinson*, "is deficient in several respects."[5] "First, the ALJ 'failed to articulate the weight, if any, he gave Dr. [Nilsen's] opinion . . . .'"[6] Though ALJ's decision makes it clear that he did not give Dr. Nilsen's opinion controlling weight, "the ALJ never expressly stated that he was not affording it controlling weight."[7]

And as in *Robinson* and *Watkins*, "[a]fter failing to articulate why he did not give Dr. [Nilsen's] opinion controlling weight, the ALJ then failed to specify what *lesser* weight he assigned to Dr. [Nilsen's] opinion."[8] "Contrary to the requirements of Soc. Sec. R. 96-2p, the ALJ did not discuss any of the relevant factors set forth in 20 C.F.R. §§ 404.1527 and 416.927."[9]

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[4]R. at 16.

[5]*Robinson*, 366 F.3d at 1082.

[6]*Id.* (quoting *Watkins*, 350 F.3d at 1301).

[7]*Id.* (citing Soc. Sec. R. 96-2p, 1996 WL 374188, at *2).

[8]*Id.* (citing *Watkins*, 350 F.3d at 1301).

[9]*Id.*

> Those factors are: (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.[10]

Because "the ALJ failed to articulate the weight, if any, he gave Dr. [Nilsen's] opinion, and . . . failed also to explain the reasons for assigning that weight or for rejecting the opinion altogether," this court "cannot simply assume the ALJ applied the correct legal standards in considering Dr. [Nilsen's] opinion."[11] Because of this violation of controlling Tenth Circuit precedent, the court therefore "must remand because [it] cannot meaningfully review the ALJ's determination absent findings explaining the weight assigned to the treating physician's opinion."[12]

CONCLUSION

The court REMANDS this case for further proceedings because the ALJ failed to state what weight he gave to Dr. Nilsen's opinion and failed to state whether he gave it any deference based on the factors in 20 C.F.R. §§ 404.1527 and 416.927.

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[10] *Watkins*, 350 F.3d at 1301–02

[11] *Id.* at 1301.

[12] *Id.*

Because of this deficiency, the court does not reach the other arguments in Mr. Fisher's petition for review. The clerk's office is directed to close the case.

SO ORDERED.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

LOUIS JOSEPH MALEK,	)	
	)	
Plaintiff,	)	Case No. 2:05-CV-322 PGC
	)	
v.	)	District Judge Paul Cassell
	)	
MARY ANN READING et al.,	)	**O R D E R**
	)	
Defendants.	)	

Plaintiff, Louis Joseph Malek, filed a prisoner civil rights complaint and asked to proceed *in forma pauperis*.[1] This Court concluded that Plaintiff had three strikes and denied his request.[2] When Plaintiff appealed this ruling, the Tenth Circuit reversed and remanded this case, stating, "Upon remand, the district court may consider that Malek now has three strikes, the previous one as noted in this case, and the two imposed in *Malek v. Brockbrader*."[3] This Court now considers these three strikes as noted by the Tenth Circuit and again denies Plaintiff's *in forma pauperis* application.

[1] *See* 42 U.S.C.S. § 1983 (2006); 28 *id.* § 1915.

[2] *See id.* § 1915(g).

[3] *Malek v. Reding*, No. 05-4134 (10th Cir. July 31, 2006) (citing *Malek v. Brockbrader*, No. 05-4118 (10th Cir. July 31, 2006)).

IT IS THEREFORE ORDERED that Plaintiff's *in forma pauperis* application is denied. If Plaintiff does not pay his full $250 filing fee within thirty days, this case will be dismissed under 28 U.S.C. § 1915(g), with no further notice to Plaintiff.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul Cassell

PAUL G. CASSELL
United States District Judge

United States District Court
for the
District of Utah
August 9, 2006

******MAILING CERTIFICATE OF THE CLERK******

RE: Louis Joseph Malek V. Mary Ann Reding et al
2:05cv322

Order mailed to:
Louis Joseph Malek
#14043
Utah State Prison
PO Box 250
Draper, UT 84020

Kim Forsgren,

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

JACOB T. CROSBY,	)	
	)	
Plaintiff,	)	Case No. 2:05-CV-433 DS
	)	
v.	)	District Judge David Sam
	)	
SIDNEY ROBERTS et al.,	)	**O R D E R**
	)	
Defendants.	)	Magistrate Judge Brooke Wells

Plaintiff Crosby's prisoner civil rights complaint[1] alleges that prison staff inadequately treated his back injuries. As to exhausting his claims in the prison grievance process, Plaintiff attached to his complaint a letter addressing his level-three grievance in which his grievance was dismissed because it was filed too late. Noting under existing Tenth Circuit caselaw that Plaintiff's untimely grievance essentially resulted in the procedural default of his grievance remedy,[2] the Court ordered Plaintiff to show cause why his complaint should not be dismissed.

Plaintiff responded by alleging a time line of his injuries and grievances that he argues justifies his late filing: On February 19, 2004, Plaintiff was originally denied medical care and lower-bunk clearance for an injury to his back. On February 24, 2004 and March 11, 2004, Plaintiff was again denied medical

[1] *See* 42 U.S.C.S. § 1983 (2006).

[2] *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004) (quoting *Graves v. Norris*, 218 F.3d 884, 885 (8th Cir. 2000)).

care and lower-bunk clearance. On March 15-17, 2004, Plaintiff was refused and delayed in seeking medical care and forced into a wheelchair and patrol car despite his intense pain. On April 17, 2004, Plaintiff's hospital discharge orders were disregarded when prison staff refused Plaintiff a wheelchair when returned to general population. Because of this refusal, Plaintiff fell on June 3, 2004, causing further injury and lengthening his recovery from surgery. On June 18, 2004, Plaintiff filed his first level-one grievance. This grievance was filed past the prison's seven-day deadline as to every alleged incident of mistreatment and injury. Plaintiff contends that his late filing should be excused because he did not know the grievance deadline, was catching up on his educational pursuits and drug program, and was unable to sit or stand for more than an hour at a time.

The Supreme Court has just held that the Prison Litigation Reform Act of 1995[3] requires prisoners to ensure "proper exhaustion" of their prison grievance remedies.[4] This "'means using all steps that the [prison] holds out, and doing so *properly*.'"[5] The Court went on to explain this doctrine: "'As a

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[3]42 U.S.C.A. § 1197e *et seq.* (2006).

[4]*Woodford v. Ngo*, 126 S. Ct. 2378, 2385 (2006); see also 42 U.S.C.A. § 1997e(a) (2006) ("No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.")

[5]*Id.* (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)).

general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice.*'"[6] The Court went on to say, "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."

Under this new precedent, Plaintiff's late grievance failed to *properly exhaust* his claim in the prison grievance process. He is thus barred by § 1997e(a) from bringing this federal lawsuit.

IT IS THEREFORE ORDERED that Plaintiff's complaint is dismissed because he did not properly exhaust his claims.

DATED this 8th day of ~~May~~ August, 2006.

BY THE COURT:

David Sam

DAVID SAM
United States District Judge

[6] *Id.* (quoting *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S. Ct. 67 (1952) (emphasis added)).

J. Craig Smith (#4143)
R. Christopher Preston (#9195)
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215 South State Street, Suite 650
Salt Lake City, Utah 84111
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Facsimile (801) 413-1620
Attorneys for Defendant/Third-Party Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

UNITED STATES OF AMERICA

Plaintiff,

and

UTAH DAIRYMEN'S ASSOCIATION, GIBBONS BROTHERS DAIRY LIMITED, and B-BAR DAIRY LLC,

Intervenor-Plaintiffs

vs.

COUNTRY CLASSIC DAIRIES, INC. doing business as DARIGOLD FARMS OF MONTANA, a Montana Corporation

Defendant.

COUNTRY CLASSIC DAIRIES, INC.,

Third-Party Plaintiff,

v.

MONTANA DEPARTMENT OF LIVESTOCK, MONTANA BOARD OF MILK CONTROL, MONTANA MILK CONTROL BUREAU, MONTE NICK, in his official capacity as Bureau Chief of the Montana Milk Control Bureau, GARY PARKER, in his official capacity as Chairperson of the Montana Board of Milk Control, ROBERT (CLYDE) GREER, in his official capacity as member of the Montana Board of Milk Control, MICHAEL KLEESE, in his official capacity as member of the

ORDER GRANTING LEAVE TO AMEND THIRD-PARTY COMPLAINT

Case No. 2:05cv00499-DS

District Judge: David Sam

Montana Board of Milk Control, JIM PRINKKI, in his official capacity as member of the Montana Board of Milk Control, and LARRY VAN DYKE, in his official capacity as member of the Montana Board of Milk Control, Third-Party Defendants.	:

Having reviewed the Motion for Leave to Amend Third-Party Complaint, and the Memorandum in Support of Motion for Leave to Amend Third-Party Complaint, and seeing good cause for such amendment:

IT IS HEREBY ORDERED that Country Classic's Motion for Leave to Amend Third-Party Complaint is granted and Country Classic may file its proposed Second Amended Third-Party Complaint.

DATED this 8th day of August, 2006.

BY THE COURT:

David Sam

The Honorable David Sam
United States District Judge

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* *

UNITED STATES OF AMERICA, Plaintiff, and UTAH DAIRYMEN'S ASSOCIATION ET AL., Intervenor-Plaintiffs, vs. COUNTRY CLASSIC DAIRIES, INC., Defendant.	Case No. 2:05CV00499 DS MEMORANDUM OPINION AND ORDER ADDRESSING COUNTRY CLASSIC'S MOTION FOR CHANGE OF VENUE

* *

I. INTRODUCTION

This action is brought under the provisions of the Agricultural Marketing Agreement Act of 1937 and the Federal Milk Marketing Order Regulating Milk in the Western Marketing Area[1], whereby it is alleged by the United States, the Utah Dairymen's Association and others, that when Country Classic sold and delivered packaged milk in the greater Salt Lake City area in 2002, it was required, but failed, to make monthly payments to the Federal Milk Market Administrator for the Western Marketing

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[1]The Western Marketing Order was terminated on April 1, 2004. *See* 69 Fed. Reg. 8327 (February 24, 2004). However, the obligations which arose thereunder continue enforceable. 7 C.F.R. § 1000.26 (c).

Order for the producer-settlement fund. Country Classic, a Montana cooperative association, contends that it has already paid into the Montana producer-settlement fund administered by the Montana Milk Control Bureau and that requiring it to account to the federal pool would result in it paying twice for the same milk.

II. DISCUSSION

Claiming that the existing venue is inconvenient to both the parties and the witnesses, Country Classic again requests that this case be transferred to the United States District Court for the District of Montana pursuant 28 U.S.C. § 1404(a). The Court previously considered and denied a similar motion. Country Classic now asserts that having filed a third-party complaint against various Montana state agencies and officials since the Court's prior ruling, the facts have changed making transfer more appropriate.

Concurrent with this opinion, the Court has filed an opinion and order granting the Third-Party Defendants' Motion to Dismiss. Therefore, the facts relied upon by Country Classic are irrelevant to the Court's venue analysis.

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil

action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). In evaluating a motion to transfer, the court considers the following.

> "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S. Ct. 2239, 2244, 101 L. Ed.2d 22 (1988)(quoting *Van Dusen*, 376 U.S. at 622, 84 S. Ct. at 812).
>
> > Among the factors [a district court] should consider is the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical.
>
> *Texas Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 147 (10th Cir. 1967).

Chrysler Credit Corp. v. Country Chrysler Inc., 928 F.2d 1509, 1516 (10th Cir. 1991). As master of the complaint, deference is given to plaintiff's forum selection. *Frontier Federal Sav. & Loan Ass'n v. National Hotel Corp.*, 675 F. Supp. 1293, 1301 (D. Utah 1987). "The defendants' burden is heavy, and unless the circumstances of the case weigh heavily in favor of the transfer, the plaintiff's choice should not be disturbed." Id.

The relevant essence of Country Classic's position is that

this case has few ties to Utah, that its witnesses and evidence are located in Montana, and that, absent transfer, it will be forced to file a separate action in Montana where it claims that personal jurisdiction is not an issue.

The record reflects that Country Classic voluntarily undertook to ship milk to Utah. Moreover, it cannot seriously be contended that neither the Plaintiff nor the Intervenor - Plaintiffs have no significant ties to this District. Other than identifying a few of its potential witnesses by name, and broadly stating that all evidence in this case must be brought to Salt Lake City, Country Classic fails to elaborate on the expected testimony of its witnesses, or to explain why it would be burdensome to bring its evidence before this court. *See Segil v. Gloria Marshall Management Co., Inc.*, 568 F. Supp. 915, 919 (D. Utah 1983)(when relying on convenience of witnesses or location of records, movant must name witnesses and location of records, discuss relevance and importance, and explain reasons for hardship or difficulty); *see also Scheidt v. Klein,* 956 F.2d 963, 966 (10th Cir. 1992). Finally, the Court agrees with both Plaintiff and Intervenor-Plaintiffs, that whatever claim Country Classic may have against the Montana agencies and officials, it has nothing to do with its obligation fo the federal producer-settlement fund, which is the subject of the present litigation. Therefore, even if Country Classic is forced to pursue any claim

it has in Montana, that fact does not favor transfer of venue.

In short, after carefully considering the written memoranda of the parties and the applicable law, the court concludes that Country Classic has failed in its burden of establishing that the circumstances of this case weigh in favor of transfer. Given the present posture of the case and the prospect that this matter may be disposed of summarily, the Court's view is that the relevant factors to be considered dictate that this case be retained in the District of Utah.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Country Classic's Motion for Change of Venue is DENIED.

DATED this 8th day of August, 2006.

BY THE COURT:

David Sam

DAVID SAM
SENIOR JUDGE
UNITED STATES DISTRICT COURT

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* *

UNITED STATES OF AMERICA, Plaintiff, and UTAH DAIRYMEN'S ASSOCIATION ET AL., Intervenor-Plaintiffs, vs. COUNTRY CLASSIC DAIRIES, INC., Defendant.	Case No. 2:05CV00499 DS MEMORANDUM OPINION AND ORDER ADDRESSING THIRD-PARTY DEFENDANTS MOTION TO DISMISS
COUNTRY CLASSIC DAIRIES, INC., Third-Party Plaintiff, vs. MONTANA DEPARTMENT OF LIVESTOCK ET AL., Third-Party Defendants.	

* *

I. INTRODUCTION

The Third-Party Defendants' (collectively the "Montana Defendants") pursuant to Fed. R. Civ. P. 12(b)(2), (3), and (6), have moved to Dismiss the Amended Third-Party Complaint filed

against them by Country Classic Dairies, Inc. ("Country Classic") for lack of personal jurisdiction, improper venue, and for failure to state a claim. Since the filing of the Montana Defendants' Motion to Dismiss the Amended Third-Party Complaint, Country Classic has sought leave of court to file a Second Amended Third-Party Complaint. The Montana Defendants having no objection, leave of court to file the Second Amended Third-Party Complaint is granted concurrently with this opinion. The Montana Defendants' Motion to Dismiss, therefore, will be construed as directed at the Second Amended Third-Party Complaint. Because the Court concludes that it lacks personal jurisdiction over the Montana Defendants, the Motion to Dismiss the Second Amended Third-Party Complaint is granted.

Briefly put, the relevant facts are as follows. The primary action before the Court is brought under the provisions of the Agricultural Marketing Agreement Act of 1937 and the Federal Milk Marketing Order Regulating Milk in the Western Marketing Area[1], whereby it is alleged by the United States, Utah Dairymen's Association and others, that when Country Classic sold and delivered packaged milk in the greater Salt Lake City area in 2002,

[1]The Western Marketing Order was terminated on April 1, 2004. *See* 69 Fed. Reg. 8327 (February 24, 2004). However, the obligations which arose thereunder continue enforceable. 7 C.F.R. § 1000.26 (c).

it was required, but failed, to make monthly payments to the Federal Milk Market Administrator for the Western Marketing Order for the producer-settlement fund. Country Classic, a Montana cooperative association, contends that it has already paid into the Montana producer-settlement fund administered by the Montana Milk Control Bureau and that requiring it to account to the federal pool would result in it paying twice for the same milk.

In its Second Amended Third-Party Complaint against the Montana Defendants, Country Classic seeks:(Claim 1) declaratory judgment that if it is found liable in the primary case, the Montana Defendants' failure to remit overpayments constitutes a violation of Montana state law; (Claims 2 & 3) declaratory judgment and compensatory damages for deprivation of its rights, privileges or immunities secured by the Constitution in violation of 42 U.S.C. § 1983; (Claim 4) assumpsit; and (Claim 5) imposition of a constructive trust on money Country Classic allegedly overpaid the Montana Defendants.

II. DISCUSSION

A. Personal Jurisdiction.

In support of their Motion to Dismiss, the Montana Defendants first urge that Country Classic has failed to make a prima facie

showing that the Court has personal jurisdiction over them. The Court agrees.

Based on the pleadings the Court has subject matter jurisdiction over this case by virtue of the Court's federal question jurisdiction. *See* 28 U.S.C. § 1331 (granting original jurisdiction over all civil actions arising under the laws of the United States).

However, "[b]efore a federal court can assert personal jurisdiction over a defendant in a federal question case, the court must determine (1) 'whether the applicable statute potentially confers jurisdiction' by authorizing service of process on the defendant and (2) 'whether the exercise of jurisdiction comports with due process'". *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1209 (10th Cir. 2000)(quoting *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 952 (11th Cir. 1997); and citing *Omni Capital Int'l Ltd. V. Rudolf Wolff & Co., Ltd.* 484 U.S. 97, 104 (1987)(finding, in a federal question case, that before a federal court may exercise personal jurisdiction over a defendant, there must be a "basis for the defendant's amenability to service of summons")). The only specific statutory claim mentioned in the Second Amended Third-Party Complaint is 42 U.S.C. § 1983. There is no nationwide service provided for civil rights claims pursuant to

§ 1983. *McChan v. Perry*, No. 00-2053, 2000 WL 1234844, at *1 (10th Cir. Aug. 31, 2000). Although Country Classic makes passing reference to antitrust and commerce clause violations, it fails to show or allege any federal statutory basis authorizing nationwide personal jurisdiction in this case.

Because Country Classic has failed to show that nationwide service of process is authorized by statute in this case, the Montana Defendants must be amenable to service under Utah's long arm statue. *Omni Capital*, 484 U.S. at 108. Under Utah law, the long-arm statute permits personal jurisdiction over a party to the fullest extent allowed by the due process clause of the Fourteen Amendment to the Constitution of the United States. Utah Code Ann. § 78-27-22. Therefore, the Court proceeds directly to the due process issue.[2] The Due Process Clause permits the "exercise of personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum

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[2]"[I]n a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant". . *Peay v. Bellsouth*, 205 F. 3d 1206, 1212 (10th Cir. 2000). However, "[t]he Due Process Clauses of the Fourteenth and Fifth Amendments are virtually identical". *Id. Compare Pike v. Clinton Fishpacking, Inc.*, 143 F. Supp. 2d 162, 166-167 (D. Mass. 2001)("notwithstanding that this is a federal question case, the Fourteenth Amendment 'minimum contacts' analysis acts indirectly on the exercise of jurisdiction in this case because the Massachusetts law is subject to Fourteenth Amendment limitations").

state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The minimum contacts test may be satisfied in two ways.

> First, a court may consistent with due process, assert *specific* jurisdiction over a nonresident defendant "if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472,105 S. Ct. 2174(internal quotations omitted). Where a court's exercise of jurisdiction does not directly arise from a defendant's forum-related activities, the court may nonetheless maintain *general* personal jurisdiction over the defendant based on the defendant's general business contacts with the forum state. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415 ... (1984). However, "[b]ecause general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's 'continuous and systematic general business contacts.'" *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996)(quoting *Helicopteros*, 466 U.S. at 416 ...).

OMI Holdings, Inc. v. Royal Ins. Co. of Canada, 149 F.3d 1086, 1090-1091 (10th Cir. 1998).

It is undisputed that the Montana Defendants have had no contacts with Utah sufficient for the Court to exercise either general or specific personal jurisdiction. However, Country

Classic urges that 28 U.S.C. § 1367[3] "'confers supplemental jurisdiction with respect to both subject matter and personal jurisdiction where the "same case or controversy" requirement is satisfied.'" Mem. Opp'n p.2 (quoting *Silent Drive, Inc. v. Strong Industries, Inc.*, 326 F.3d 1194, 1206 (Fed. Cir. 2003).

Country Classic's reliance on *Silent Drive, id.*, in this case is misplaced. "Supplemental jurisdiction, by whatever name, is a doctrine of subject matter jurisdiction. It permits federal courts to entertain claims that individually do not satisfy an independent basis of federal subject matter jurisdiction, such as diversity of citizenship or federal question jurisdiction." 13B Charles Alan Wright & Arthur A. Miller, *Federal Practice & Procedure* § 3567. Therefore, even assuming arguendo that the Court had supplemental jurisdiction over the third-party claims, the Court must still have personal jurisdiction over the Montana Defendants in order to adjudicate the claims against them.

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[3]"Except as provided ... in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367(a).

The Tenth Circuit, like several other circuits, has recognized the unrelated doctrine of pendent personal jurisdiction. "As a matter of common law, several courts have recognized a doctrine of 'pendent personal jurisdiction,' which is wholly unrelated to § 1367. Pendent personal jurisdiction permits a court to entertain a claim against a defendant over whom it lacks personal jurisdiction, but only if that claim arises from a common nucleus of operative fact with a claim in the same suit for which the court does have personal jurisdiction over that defendant." Id. (citing among other cases, *United States v. Botefuhr*, 309 F.3d 1263, 1272-1275 (10th Cir 2002)). *Botefuhr* instructs:

> Pendent personal jurisdiction, like its better known cousin, supplemental subject matter jurisdiction, exists when a court possesses personal jurisdiction over a defendant for one claim, lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact, and then, because it possesses personal jurisdiction over the first claim, asserts personal jurisdiction over the second claim. ... In essence, once a district court has personal jurisdiction over a defendant for one claim, it may 'piggyback' onto that claim other claims over which it lacks independent personal jurisdiction, provided that all the claims arise from the same facts as the claim over which it has proper personal jurisdiction.

Botefuhr, 309 F. 3d at 1272 (citations omitted). Inasmuch as the Court does not possess personal jurisdiction over any of Country Classic's claims, the doctrine of pendent personal jurisdiction is inapplicable.

In sum, because there is no basis for the Court to exercise personal jurisdiction over the Montana Defendants, their Motion to Dismiss the Second Amended Third-Party Complaint for lack of personal jurisdiction is granted.[4] The Court need not, and does not, address the other issues raised by the Montana Defendants in support of the Motion to Dismiss.

IT IS SO ORDERED.

DATED this 8th day of August, 2006.

BY THE COURT:

David Sam

DAVID SAM
SENIOR JUDGE
UNITED STATES DISTRICT COURT

[4]Country Classic suggest that if the Court finds that it has no jurisdiction over the Montana Defendants, then the Court must transfer the case to the District of Montana pursuant to 28 U.S.C. § 1631. Under § 1631, a court "shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought...". The Court finds that Country Classic has failed to show that it is in the interest of justice to transfer this case to the District of Montana. *See* concurrently filed Memorandum Decision and Order Denying Motion for Change of Venue as well as pleadings in opposition to that Motion.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

M.D. DIET WEIGHT LOSS AND NUTRITION CLINIC, L.C., Plaintiff, vs. ABSOLUTE WEIGHT LOSS AND NUTRITION CENTER, LLC, Defendant.	Case No. 2:05CV0605 TS ORDER STRIKING HEARING The Honorable Judge Ted Stewart Magistrate Judge Brooke C. Wells

In light of the recent order entered by Judge Stewart concerning the Motion to Stay,[1] the court hereby STRIKES the hearing scheduled for August 17, 2006. The Motion to Stay impacts the motions pending before this court. Therefore, this court will enter a decision on those motions or hold a hearing, if necessary, following resolution of the Motion to Stay.

IT IS SO ORDERED.

DATED this 9th day of August, 2006.

Brooke C. Wells
United States Magistrate Judge

[1] Docket no. 81.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

WILLIAM HENRY SHERRATT,	)	
	)	
Plaintiff,	)	Case No. 2:05-CV-658 TS
	)	
v.	)	District Judge Ted Stewart
	)	
ROBERT T. BRAITHWAITE et al.,	)	**O R D E R**
	)	
Defendants.	)	Magistrate Judge Brooke Wells

Plaintiff, inmate William Henry Sherratt, has filed a *pro se* civil rights complaint. *See* 42 U.S.C.S. § 1983 (2006). Plaintiff's application to proceed *in forma pauperis* has been granted. Plaintiff now moves for service of process.

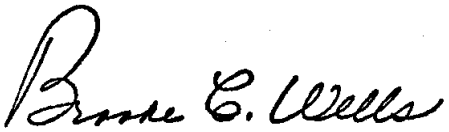
This motion is unnecessary because Plaintiff is proceeding *in forma pauperis*. *See* 28 *id.* § 1915. In such cases, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases." *See id.* § 1915(d). The Court will screen Plaintiff's amended complaint at its earliest convenience and determine whether to dismiss it or order it to be served upon Defendants. *See id.* § 1915A. Plaintiff need do nothing to trigger this process.

IT IS HEREBY ORDERED that Plaintiff's motion for service of process is denied; however, if, after the case is screened, it

appears that this case has merit and states a claim upon which relief may be granted, the Court will order service of process.

DATED this 9th day of August, 2006.

BY THE COURT:



BROOKE C. WELLS
United States Magistrate Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CHRISTOPHER JAMES WINDERLIN, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	ORDER DIRECTING BRIEFING FROM GOVERNMENT Case No. 2:05-cv-699 PGC

The court hereby ORDERS the attorneys for the United States to respond on the merits to the arguments that plaintiff Christopher Winderlin makes in his § 2255 motion regarding credit for time served. The government shall submit a brief on this issue no later than forty-five (45) days from the date of this order.

SO ORDERED.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

P.J., a minor, by and through his parents and natural guardians, BARBARA and DAREN JENSEN; BARBARA JENSEN, individually; and DAREN JENSEN, individually, Plaintiffs, vs. STATE OF UTAH; INTERMOUNTAIN HEALTH CARE, INC.; KARI CUNNINGHAM, in her individual capacity; RICHARD ANDERSON, in his individual and official capacities; LARS M. WAGNER, in his individual capacity; DAVID L. CORWIN, in his individual capacity; CHERYL M. COFFIN, in her individual capacity; KAREN H. ALBRITTON, in her individual capacity; SUSAN EISENMAN, in her individual capacity; and JANE AND JOHN DOE, in their individual capacities, Defendants.	**ORDER OF DISMISSAL OF INTERMOUNTAIN HEALTH CARE, INC., WITHOUT PREJUDICE** Case No. 2:05CV00739 PGC

Based on the stipulation of the plaintiffs and defendant, Intermountain Health Care, Inc., along with the motion and supporting memorandum filed by said defendant, Intermountain Health Care, Inc., is dismissed as a party in this case, without prejudice.

Any limitation period(s) applicable to any of the plaintiffs or any of the defendants

asserting claims against IHC relating to the facts and circumstances alleged in the Complaint will be tolled and will not continue to run during the pendency of this case, unless IHC is brought back into the case as a party. In that event, this tolling provision shall only be effective during the period of time that IHC is not a party.

Any party to this case shall have the right, prior to trial, to move the court to bring IHC back into this case as a party. Such motions shall be granted liberally. The court APPROVES the stipulated motion to dismiss Intermountain Health Care, Inc. (#73).

SO ORDERED.

DATED this 9th day of August, 2006.

Paul G. Cassell
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

JOHNNY RAY CALDWELL,	)	
	)	
Plaintiff,	)	Case No. 2:05-CV-740 TS
	)	
v.	)	District Judge Ted Stewart
	)	
UTAH STATE PRISON et al.,	)	**O R D E R**
	)	
Defendants.	)	Magistrate Judge Brooke Wells

Plaintiff, Johnny Ray Caldwell, has filed a *pro se* prisoner civil rights complaint. *See* 42 U.S.C.S. § 1983 (2006). Plaintiff's application to proceed *in forma pauperis* has been granted. Plaintiff now moves for appointed counsel, service of process, and an extension of time in which to file a response to the Court's Order to Show Cause.

The Court first considers the motion for appointed counsel. Plaintiff has no constitutional right to counsel. *See Carper v. Deland*, 54 F.3d 613, 616 (10th Cir. 1995); *Bee v. Utah State Prison*, 823 F.2d 397, 399 (10th Cir. 1987). However, the Court may in its discretion appoint counsel for indigent inmates. *See* 28 U.S.C.S. § 1915(e)(1) (2006); *Carper*, 54 F.3d at 617; *Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991). "The burden is upon the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel." *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985).

When deciding whether to appoint counsel, the district court should consider a variety of factors, "including 'the merits of the litigant's claims, the nature of the factual issues raised in the claims, the litigant's ability to present his claims, and the complexity of the legal issues raised by the claims.'" *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995) (quoting *Williams*, 926 F.2d at 996); *accord McCarthy*, 753 F.2d at 838-39. Considering the above factors, the Court concludes here that (1) it is not clear at this point that Plaintiff has asserted a colorable claim; (2) the issues in this case are not complex; and (3) Plaintiff is not incapacitated or unable to adequately function in pursuing this matter. Thus, the Court denies for now Plaintiff's motion for appointed counsel.

The Court next denies Plaintiff's two motions for service of process. These motions are unnecessary because Plaintiff is proceeding *in forma pauperis*. *See* 28 U.S.C.S. § 1915 (2006). In such cases, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases." *See id.* § 1915(d). The Court will screen Plaintiff's amended complaint at its earliest convenience and determine whether to dismiss it or order it to be served upon Defendants. *See id.* § 1915A. Plaintiff need do nothing to trigger this process.

Finally, the Court denies as moot Plaintiff's motion for an extension of time in which to respond to the Court's Order to

Show Cause. Plaintiff has since filed his response, which was accepted by the Court.

IT IS HEREBY ORDERED that:

(1) Plaintiff's request for appointed counsel is denied, *see* File Entry # 5; however, if, after the case is screened, it appears that counsel may be needed or of specific help, the Court will ask an attorney to appear pro bono on Plaintiff's behalf.

(2) Plaintiff's motions for service of process are denied, *see* File Entry #s 6 & 12; however, if, after the case is screened, it appears that this case has merit and states a claim upon which relief may be granted, the Court will order service of process.

(3) Plaintiff's motion for a time extension is denied. *See* File Entry # 14.

DATED this 9th day of August, 2006.

BY THE COURT:

Brooke C. Wells

BROOKE C. WELLS
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

United States of America Plaintiff	*	CASE NO. 2:06-CR-406 DAK
v.	*	Appearing on behalf of: United States of America
Shaun Walker, et al. Defendant.	*	(Plaintiff/Defendant)

MOTION AND CONSENT OF DESIGNATED ASSOCIATE LOCAL COUNSEL

I, Carlos Esqueda, hereby move the pro hac vice admission of petitioner to practice in this Court. I hereby agree to serve as designated local counsel for the subject case; to readily communicate with opposing counsel and the Court regarding the conduct of this case; and to accept papers when served and recognize my responsibility and full authority to act for and on behalf of the client in all case-related proceedings, including hearings, pretrial conferences, and trials, should Petitioner fail to respond to any Court order.

Date: August 8, 2006 (Signature of Local Counsel) 5386 (Utah Bar Number)

APPLICATION FOR ADMISSION PRO HAC VICE

Petitioner, Stephen J. Curran, hereby requests permission to appear pro hac vice in the subject case. Petitioner states under penalty of perjury that he/she is a member in good standing of the bar of the highest court of a state or the District of Columbia; is (i) ___ a non-resident of the State of Utah or, (ii) ___ a new resident who has applied for admission to the Utah State Bar and will take the bar examination at the next scheduled date; and, under DUCivR 83-1.1(d), has associated local counsel in this case. Petitioner's address, office telephone, the courts to which admitted, and the respective dates of admission are provided as required.

Petitioner designates Assistant U.S. Attorney Carlos Esqueda as associate local counsel.

Date: August 7, 2006. Check here ____ if petitioner is lead counsel.

(Signature of Petitioner)

Name of Petitioner: Stephen J. Curran Office Telephone: (202) 514-3204
(Area Code and **Main** Office Number)

Business Address: U.S. Department of Justice, Civil Rights Division, Criminal Section
(Firm/Business Name)
950 Pennsylvania Avenue, N.W. Washington, D.C. 20530
Street City State Zip

BAR ADMISSION HISTORY

COURTS TO WHICH ADMITTED	LOCATION	DATE OF ADMISSION
Commonwealth of Massachusetts Bar		4/29/1997
Washington State Bar		5/21/1997

(If additional space is needed, attach separate sheet.)

PRIOR PRO HAC VICE ADMISSIONS IN THIS DISTRICT

CASE TITLE	CASE NUMBER	DATE OF ADMISSION
None		

(If additional space is needed, attach a separate sheet.)

NO FEE REQUIRED

ORDER OF ADMISSION

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for Petitioner's admission pro hac vice in the United States District Court, District of Utah in the subject case is GRANTED.

This 9th day of August, 2006.

Dale A. Kimball

U.S. District Judge

United States District Court

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA
V.

ORDER SETTING CONDITIONS OF RELEASE

Nicholas Lowery

Case Number: WA-06-250 M

IT IS SO ORDERED that the release of the defendant is subject to the following conditions:

(1) The defendant shall not commit any offense in violation of federal, state or local or tribal law while on release in this case.

(2) The defendant shall immediately advise the court, defense counsel and the U.S. attorney in writing of any change in address and telephone number.

(3) The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed

as directed. The defendant shall next appear at (if blank, to be notified) _____
PLACE

_____ on _____
DATE AND TIME

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released provided that:

(✔) (4) The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed.

( ) (5) The defendant executes an unsecured bond binding the defendant to pay the United States the sum of

_____ dollars ($) _____

in the event of a failure to appear as required or to surrender as directed for service of any sentence imposed.

Additional Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant and the safety of other persons and the community, it is FURTHER ORDERED that the release of the defendant is subject to the conditions marked below:

( ) (6) The defendant is placed in the custody of:
(Name of person or organization)
(Address)
(City and state) (Tel.No.)
who agrees (a) to supervise the defendant in accordance with all the conditions of release, (b) to use every effort to assure the appearance of the defendant at all scheduled court proceedings, and (c) to notify the court immediately in the event the defendant violates any conditions of release or disappears.

Signed: _____
Custodian or Proxy

(X) (7) The defendant shall:
(X) (a) maintain or actively seek employment.
( ) (b) maintain or commence an educational program.
( ) (c) abide by the following restrictions on his personal associations, place of abode, or travel:

( ) (d) avoid all contact with the following named persons, who are considered either alleged victims or potential witnesses:

(X) (e) report on a regular basis to the supervising officer as directed. 1 personal visit a month.
( ) (f) comply with the following curfew:
(X) (g) refrain from possessing a firearm, destructive device, or other dangerous weapon.
(X) (h) refrain from excessive use of alcohol.
(X) (i) refrain from any use or unlawful possession of a narcotic drug and other controlled substances defined in 21 U.S.C.§802 unless prescribed by a licensed medical practitioner.
( ) (j) undergo medical or psychiatric treatment and/or remain in an institution, as follows:

( ) (k) execute a bond or an agreement to forfeit upon failing to appear as required, the following sum of money or designated property

( ) (l) post with the court the following indicia of ownership of the above-described property, or the following amount or percentage of the above-described money:

( ) (m) execute a bail bond with solvent sureties in the amount of $
( ) (n) return to custody each (week)day as of _____ o'clock after being released each (week)day as of) _____ o'clock for employment, schooling or the following limited purpose(s):

( ) (o) surrender any passport to
( ) (p) obtain no passport
(X) (q) the defendant will submit to drug/alcohol testing as directed by the pretrial office. If testing reveals illegal drug use, the defendant shall participate in drug and/or alcohol abuse treatment, if deemed advisable by supervising officer.
( ) (r) participate in a program of inpatient or outpatient substance abuse therapy and counseling if deemed advisable by the supervising officer.
( ) (s) submit to an electronic monitoring program as directed by the supervising officer.
(X) (t) no internet access at all i.e. computers, pda, email, etc.
(X) (u) If dft is to leave the state of UT he is to get permission from USPO
(X) (v) Maintain residence at fathers home, unless dft has permission from USPO
(X) (w) Dft is to participate in a Mental Health Evaluation and abide by all recommendations provided
(X) (x) No Unsupervised contact with individuals under the age of 18 unless supervised by an adult with permission from USPO

TO THE DEFENDANT:

Advice of Penalties and Sanctions

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

A violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of release, an order of detention, and a prosecution for contempt of court and could result in a term of imprisonment, a fine, or both.

The commission of a Federal offense while on pretrial release will result in an additional sentence of a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be in addition to any other sentence.

Federal law makes it a crime punishable by up to 10 years of imprisonment, and a $250,000 fine or both to obstruct a criminal investigation. It is a crime punishable by up to ten years of imprisonment and a $250,000 fine or both to tamper with a witness, victim or informant; to retaliate or attempt to retaliate against a witness. victim or informant; or to intimidate or attempt to intimidate a witness, victim, juror, informant, or officer of the court. The penalties for tampering, retaliation, or intimidation are significantly more serious if they involve a killing or attempted killing.

If after release, you knowingly fail to appear as required by the conditions of release, or to surrender for the service of sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

(1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years of more, you shall be fined not more than $250,000 or imprisoned for not more than 10 years, or both;

(2) an offense punishable by imprisonment for a tem of five years or more, but less than fifteen years, you shall be fined not more than $250,000 or imprisoned for not more than five years, or both;

(3) any other felony, you shall be fined not more than $250,000 or imprisoned not more than two years, or both.

(4) a misdemeanor, you shall be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be in additions to the sentence for any other offense. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgment of Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release , to appear as directed , and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions set forth above.

Signature of Defendant

280 400 N

Address

Springville UT 801 489-4008

City and State Telephone

Directions to the United States Marshal

(✓) The defendant is ORDERED released after processing.

( ) The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judicial officer that the defendant has posted bond and/or complied with all other conditions for release. The defendant shall be produced before the appropriate judicial officer at the time and place specified, if still in custody.

Date: 9 August 2006

Signature of Judicial Officer

Magistrate Judge Paul M. Warner

Name and Title of Judicial Officer

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CHRISTENA WHITE, Plaintiff, vs. SCOTT JOHN OCKEY, et al., Defendants.	MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION TO STRIKE AND GRANTING STATE DEFENDANTS' MOTION TO DISMISS Case No. 2:06-CV-17 TS

Plaintiff, proceeding *pro se* and *in forma pauperis*, has brought suit alleging a number of causes of action against a number of Defendants, including the State of Utah, the Utah Attorney General's Office, the Utah Department of Commerce (Securities Division), Mark Shurtleff, Charlene Barlow, Michael Hines, and Paul Feindt (hereinafter "the State Defendants"). The State Defendants have filed a Motion to Dismiss Plaintiff's Second Amended Complaint, as against them. Plaintiff has responded by filing a Motion to Strike and has also submitted a substantive response. For the reasons discussed below, the Court will deny Plaintiff's Motion to Strike and will grant the State Defendants' Motion to Dismiss.

I. INTRODUCTION

Plaintiff's Second Amended Complaint[1] alleges the following causes of action against the State Defendants: (1) a defamation claim against Defendant Barlow (Fourth Cause of Action); (2) an abuse of process claim against Defendants Barlow, Hines, and Feindt (Eighth Cause of Action); (3) claims for civil rights violations against Defendants Barlow, Hines, and Feindt (Eighth and Sixteenth Causes of Action); (4) a claim for intentional interference with economic development against Defendants Barlow, Hines, and Feindt (Twelfth Cause of Action); (5) a claim for negligent interference with economic development against Defendants Barlow, Hines, and Feindt (Thirteenth Cause of Action); and (6) a claim for intentional infliction of emotional distress against Defendants Barlow, Hines, and Feindt (Fifteenth Cause of Action).

II. PLAINTIFF'S MOTION TO STRIKE

In response to the State Defendants Motion to Dismiss, Plaintiff has filed a Motion to Strike and has also filed a substantive response. Plaintiff's Motion to Strike provides no valid reasons for the Court to strike the State Defendant's Motion to Dismiss. Therefore, the Motion to Strike will be denied.

III. RULE 12(b)(6) STANDARD

"Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend."[2] "A court reviewing the sufficiency of a complaint presumes all

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[1]Docket No. 26.

[2]*Perkins v. Kan. Dept. of Corrections*, 165 F.3d 803, 806 (10th Cir. 1999).

of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff."[3] "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers."[4] This means "that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements."[5]

IV. DISCUSSION

The State Defendants argue that the Court should dismiss Plaintiff's Second Amended Complaint on the following grounds: (1) the Eleventh Amendment bars Plaintiff's claims against the State, its divisions, and its employees in their official capacities; (2) Defendant Shurtleff is not affirmatively linked to the alleged constitutional violations; (3) Plaintiff's state law tort claims are barred by the Utah Governmental Immunity Act; (4) the State of Utah, its divisions, and employees, in their official capacities, are immune from suit; (5) Defendant Barlow is entitled to absolute immunity; (6) Plaintiff fails to plead a claim for defamation against Barlow and the claim is barred by the statute of limitations; and (7) Defendants Hines and Feindt are entitled to qualified immunity.

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[3] *Hall v. Bellmon*, 935 F.2d 1006, 1109 (10th Cir. 1991).

[4] *Id*. at 1110.

[5] *Id*.

A. ELEVENTH AMENDMENT IMMUNITY

The State Defendants first argue that the Eleventh Amendment bars Plaintiff's § 1983 claims—Plaintiff's Eighth and Sixteenth Causes of Action. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[6] The Eleventh Amendment bars suits for damages against a state or arms of the state in federal court, absent a waiver of immunity by the state.[7] The Eleventh Amendment also applies to state officers sued for damages in their official capacities because they assume the identity of the government that employs them.[8]

There are two circumstances in which a citizen may sue a State in federal court without running afoul of the Eleventh Amendment: (1) where the state waives immunity; or (2) where Congress specifically abrogates Eleventh Amendment immunity. Here, the state has not waived its Eleventh Amendment immunity.[9] Moreover, the passage of § 1983 was not intended to abrogate Eleventh Amendment immunity.[10]

Further, the state, its divisions, and its employees, in their official capacities are not subject to suit under § 1983. "Neither the state, nor a governmental entity that is an arm of the

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[6]U.S. Const. amend XI.

[7]*Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

[8]*Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989).

[9]*Richins v. Indus. Constr., Inc.*, 502 F.3d 1051 (10th Cir. 1974) (Utah Government Act did not constitute waiver of Eleventh Amendment immunity).

[10]*Quern v. Jordan*, 40 U.S. 332, 345 (1979).

state for Eleventh Amendment purposes, nor a state official who acts in his or her official capacity, is a 'person' within the meaning of § 1983."[11] Thus, Plaintiff's § 1983 claims—Plaintiff's Eighth and Sixteenth Causes of Action—are dismissed as against the State Defendants.

B. CLAIMS AGAINST DEFENDANT SHURTLEFF

"To prevail on a claim for damages for a constitutional violation pursuant to 42 U.S.C. § 1983, a plaintiff must establish the defendant acted under color of state law and caused or contributed to the alleged violation."[12] A plaintiff must show that the defendant personally participated in the alleged violation.[13] Conclusory allegations are not enough to satisfy this burden.[14]

There is no concept of strict supervisor liability under § 1983.[15] But a state actor who participated in a violation in a supervisory role may incur liability.[16] It is not enough, however, "for a plaintiff merely to show a defendant was in charge of other state actors who actually committed the violation. Instead, just as with any individual defendant, the plaintiff must

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[11] *Harris v. Champion*, 51 F.3d 901, 905–06 (10th Cir. 1995).

[12] *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996).

[13] *Id*.

[14] *Id*.

[15] *Beedle v. Wilson*, 422 F.3d 1059, 1073 (10th Cir. 2005).

[16] *Jenkins*, 81 F.3d at 994.

establish 'a deliberate, intentional act by the supervisor to violate constitutional rights.'"[17] In order to satisfy this standard, a plaintiff must show that "the defendant-supervisor personally directed the violation or had actual knowledge of the violation and acquiesced in its continuance."[18]

Here, Plaintiff's Second Amended Complaint is completely devoid of any mention of Defendant Shurtleff, other than naming him as a party. Thus, the Court finds that Plaintiff has failed to establish any affirmative link between the allegation made in her Second Amended Complaint and Defendant Shurtleff.[19] Therefore, Defendant Shurtleff is dismissed from this action.

C. THE UTAH GOVERNMENTAL IMMUNITY ACT

The Utah Governmental Immunity Act ("UGIA")[20] mandates that a person having a claim for injury shall direct and deliver a notice of claim to "the attorney general within one year after the claim arises," for "an act or omission occurring during the performance of an employee's duties, within the scope of employment, or under color of authority."[21] Utah courts have

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[17]*Id*. at 994–95 (quoting *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir. 1992)).

[18]*Id*. at 995.

[19]*See Stidham v. Peace Officer Standards and Training*, 265 F.3d 1144, 1156–57 (10th Cir. 2001).

[20]Utah Code Ann. § 63-30-1 *et seq*. In 2004, the UGIA was repealed and re-enacted under Utah Code Ann. § 63-30d-101 *et seq*. Since the injuries alleged here occurred before July 1, 2004, the Court will employ the prior version of the UGIA.

[21]Utah Code Ann. § 63-30-12.

"consistently and uniformly held that suit may not be brought against the State or its subdivisions unless the requirements of the Governmental Immunity Act are strictly followed."[22]

Plaintiff filed her Notice of Claim on May 2, 2006. All of Plaintiff's claims against the State Defendants, however, arose in either 2001 or 2002, except for Plaintiff's defamation claim against Defendant Barlow, which arose in 2004. Since Plaintiff did not file a timely notice of claim, Plaintiff's claims are barred by the UGIA.

The State Defendants further argue that they are immune from suit under the UGIA. Determining whether the State Defendants are immune from suit under the UGIA requires the Court to answer three questions: (1) was the activity the entity performed a governmental function and therefore immunized from suit by the general grant of immunity contained in Utah Code Ann. § 63-30-3; (2) if the activity undertaken was a governmental function, has some other section of the Act waived that blanket immunity; and (3) if the blanket immunity has been waived, does the Act also contain an exception to that waiver which results in a retention of immunity against the particular claim asserted in this case.[23]

Here, the act of investigating and prosecuting a securities violation clearly falls within the definition of a "governmental function." Thus, this first step is met.

Second, the Court must determine whether immunity has been waived. Immunity is waived for injury proximately caused by a negligent act or omission of an employee committed

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[22]*Hall v. Utah State Dep't of Corr.*, 24 P.3d 958, 965 (Utah 2001).

[23]*Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162, 1164 (Utah 1993).

within the scope of employment.[24] Thus, immunity is waived for Plaintiff's claims that Defendants Barlow, Hines, and Feindt engaged in negligent acts. That immunity is not waived, however, for Plaintiff's claims that these Defendants engaged in intentional torts and those claims must be dismissed.

The third step is to determine whether there is an exception to that waiver of immunity which results in a retention of immunity. Section 63-30-10 contains numerous exceptions which apply here. Therefore, the Court finds that the UGIA bars Plaintiff's tort claims.

D. PROSECUTORIAL IMMUNITY

The Supreme Court, in *Imbler v. Pachtman*,[25] held that prosecutors are entitled to absolute immunity brought pursuant to § 1983 for activities "intimately associated with the judicial phase of the criminal process."[26] Plaintiff's claims against Defendant Barlow arise from her prosecution of Plaintiff for securities violations. As a result, Defendant Barlow enjoys absolute immunity for her actions relating to the prosecution of Plaintiff. Therefore, Plaintiff's claims against Defendant Barlow must be dismissed.

E. PLAINTIFF'S DEFAMATION CLAIM AGAINST DEFENDANT BARLOW

In order to state a claim for defamation under Utah law, Plaintiff "must show that defendant published the statements concerning [her], that the statements were false, defamatory,

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[24]Utah Code Ann. § 63-30-10.

[25]424 U.S. 409 (1976).

[26]*Id*. at 995.

and not subject to any privilege, that the statements were published with the requisite degree of fault, and that their publication resulted in damage."[27]

Here, Plaintiff's defamation claim against Defendant Barlow—Plaintiff's Fourth Cause of Action—fails because Plaintiff failed to plead that the statements were false. Therefore, Plaintiff's defamation claim must be dismissed.

F. QUALIFIED IMMUNITY

Since Plaintiff's Second Amended Complaint must be dismissed as against the State Defendants for the numerous reasons stated above, the Court finds it unnecessary to discuss the State Defendant's qualified immunity claim.

V. CONCLUSION

It is therefore

ORDERED that Plaintiff's Motion to Strike (Docket No. 40) is DENIED. It is further

ORDERED that State Defendants' Motion to Dismiss (Docket No. 34) is GRANTED.

DATED August 7th, 2006.

BY THE COURT:

TED STEWART
United States District Judge

[27] *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994).

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CHRISTENA WHITE, Plaintiff, vs. SCOTT JOHN OCKEY, et al., Defendants.	MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT OCKEY'S MOTION TO DISMISS AND CLOSING CASE Case No. 2:06-CV-17 TS

This matter comes before the Court on Defendant Scott John Ockey's Motion to Dismiss. For the reasons discussed below, the Court will grant the Motion.

I. BACKGROUND

The history of the parties involved in the above-entitled case is complicated and lengthy. Defendant Ockey filed suit against Plaintiff in Utah state court on October 18, 2001.[1] Summary judgment was entered in favor of Ockey and against White in that action. That decision was later

[1]Docket No. 15.

reversed and remanded by the Utah Court of Appeals.[2] In addition to the state court suit, White brought suit against Ockey in this Court, before Judge Campbell.[3] The matter before Judge Campbell was dismissed[4] as a result of the continuing action in state court. The state court action was subsequently resolved, after a bench trial, in Ockey's favor, on April 20, 2006.[5] White brought this action against Ockey and a number of others.

Defendant now argues that Plaintiff's claim must be dismissed because all of Plaintiff's claims in the present action arise from the same landlord/tenant action that was the subject of the state court proceedings. Defendant argues that all of Plaintiff's claims were compulsory counterclaims that could have, but were not, raised in that action.

II. DISCUSSION

"The doctrine of res judicata, or claim preclusion, will prevent a party from relitigating a legal claim that was *or could have been* the subject of a previously issued final judgment."[6] "Under Tenth Circuit law, claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits."[7] "If these requirements are met, res judicata is

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[2] *Ockey v. White*, 2004 UT App. 11, ¶ 2, 2004 WL 103188 (unpublished opinion).

[3] *White v. Ockey*, 2:03-CV-690 TC.

[4] *See* Docket No. 45, Civil No. 2:03-CV-690 TC.

[5] *See* Docket No. 15, Civil No. 2:06-CV-17 TS.

[6] *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005) (emphasis added).

[7] *Id*.

appropriate unless the party seeking to avoid preclusion did not have a 'full and fair opportunity' to litigate the claim in the prior suit."[8]

Here, the parties to the prior state action were the same. A final judgment was rendered in the state action on April 20, 2006, wherein judgment was granted in favor of Ockey after a bench trial. In addition, the identity of the cause of action is also present in both suits.

The Tenth Circuit has adopted a "transactional approach" to determine what constitutes a cause of action for preclusion purposes. The Tenth Circuit has stated:

> The third element requires that the suits be based on the same cause of action. This circuit embraces the transactional approach to the definition of "cause of action." Under this approach, a cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation.[9]

Here, all of Plaintiff's allegations arise out of the same landlord/tenant dispute and the activities that followed, which were the subject of the state action. Thus, the third prong of claim preclusion is met. Finally, there is no indication that White did not have a full and fair opportunity to litigate her claims in the prior state action. While White alleges that her counterclaims were dismissed on a legal technicality, there is no evidence that she did not have a full and fair opportunity to litigate them. Accordingly, Plaintiff's suit, as against Defendant Ockey, is barred by res judicata.

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[8] *Id*. (quoting *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 n.4 (10th Cir. 1999)).

[9] *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997) (internal quotation marks and citations omitted). *See also Yapp*, 186 F.3d at 1227.

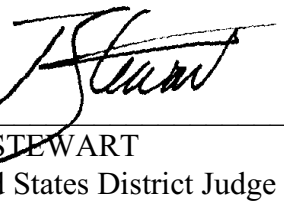
III. CONCLUSION

It is therefore

ORDERED that Defendant Ockey's Motion to Dismiss is GRANTED. The Clerk of the Court is directed to close this case forthwith.

DATED August 7th, 2006.

BY THE COURT:



TED STEWART
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

KARL DEE KAY,	)	
	)	
Plaintiff,	)	Case No. 2:06-CV-23 TS
	)	
v.	)	District Judge Ted Stewart
	)	
CLINT FRIEL et al.,	)	**O R D E R**
	)	
Defendants.	)	Magistrate Judge Brooke Wells

Plaintiff, Karl Dee Kay, has filed a *pro se* prisoner civil rights complaint. *See* 42 U.S.C.S. § 1983 (2006). Plaintiff's application to proceed *in forma pauperis* has been granted. Plaintiff now moves for appointed counsel and service of process.

The Court first considers the motion for appointed counsel. Plaintiff has no constitutional right to counsel. *See Carper v. Deland*, 54 F.3d 613, 616 (10th Cir. 1995); *Bee v. Utah State Prison*, 823 F.2d 397, 399 (10th Cir. 1987). However, the Court may in its discretion appoint counsel for indigent inmates. *See* 28 U.S.C.S. § 1915(e)(1) (2006); *Carper*, 54 F.3d at 617; *Williams v. Meese*, 926 F.2d 994, 996 (10th Cir. 1991). "The burden is upon the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel." *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985).

When deciding whether to appoint counsel, the district court should consider a variety of factors, "including 'the merits of the litigant's claims, the nature of the factual issues raised in

the claims, the litigant's ability to present his claims, and the complexity of the legal issues raised by the claims.'" *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995) (quoting *Williams*, 926 F.2d at 996); *accord McCarthy*, 753 F.2d at 838-39. Considering the above factors, the Court concludes here that (1) it is not clear at this point that Plaintiff has asserted a colorable claim; (2) the issues in this case are not complex; and (3) Plaintiff is not incapacitated or unable to adequately function in pursuing this matter. Thus, the Court denies for now Plaintiff's motion for appointed counsel.

The Court next denies Plaintiff's motion for service of process. This motion is unnecessary because Plaintiff is proceeding *in forma pauperis*. *See* 28 U.S.C.S. § 1915 (2006). In such cases, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases." *See id.* § 1915(d). The Court will screen Plaintiff's amended complaint at its earliest convenience and determine whether to dismiss it or order it to be served upon Defendants. *See id.* § 1915A. Plaintiff need do nothing to trigger this process.

IT IS HEREBY ORDERED that:

(1) Plaintiff's request for appointed counsel is denied; however, if, after the case is screened, it appears that counsel may be needed or of specific help, the Court will ask an attorney to appear pro bono on Plaintiff's behalf.

(2) Plaintiff's motion for service of process is denied; however, if, after the case is screened, it appears that this case has merit and states a claim upon which relief may be granted, the Court will order service of process.

DATED this 9th day of August, 2006.

BY THE COURT:

Brooke C. Wells

BROOKE C. WELLS
United States Magistrate Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

THEODORE L. HANSEN; INTERSTATE ENERGY CORP.; AND TRIPLE M, L.L.C., Plaintiffs, vs. NATIVE AMERICAN REFINERY CO. aka NATIVE AMERICAN REFINERY COMPANY, INC.; PT. BANK NEGARA INDONESIA (PERSERO) TBK; EKO BUDIWIYONO; DRS. FIRMANSYAH; GATOT SISMOYO; RACHMAT WIRIATMAJA; YOPIE LAMONGE; MAX NIODE; LILLES HANDAYANI; UTTI KARIAYAM; MUBARIK ASDJATIMUDA; STEVE O.Z. FINKEL-MINKIN aka STEVE FINKEL; ROBERT MCKEE; FRED NEWCOMB; NEWCOMB & CO.; AND DOES 1-20, Defendants.	ORDER APPROVING STIPULATED ENLARGEMENT OF TIME TO FILE PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS FRED NEWCOMB AND NEWCOMB & COMPANY'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 2:06-CV-00109 PGC

This matter comes before the court on the parties' stipulated request to extend the time

for the plaintiffs to file a memorandum in opposition to defendants Fred Newcomb and Newcomb & Company's Motion to Dismiss for Lack of Jurisdiction until August 25, 2006.

This is the plaintiffs' first request for an extension of time. Based on this, the Stipulation for Enlargement of Time is APPROVED (#29). The plaintiffs shall file and serve their memorandum in opposition on or before August 25, 2006. When seeking any future extensions, counsel for the plaintiffs is reminded to explain the cause, as required by the rules.[1]

SO ORDERED.

DATED this 9th day of August, 2006.

Paul G. Cassell
United States District Judge

[1]*See* Fed. R. Civ. P. 6(b); D.U. Civ. 7-1(b)(1).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH CENTRAL DIVISION

PARAMOUNT PICTURES CORPORATION, TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL CITY STUDIOS LLLP, and UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP, Plaintiffs, v. CHRIS THOMPSON and DOES 1-10, Defendants.	**CONSENT JUDGMENT AND PERMANENT INJUNCTION** Case No. 2:06-CV-156 DAK District Judge Dale A. Kimball

CONSENT JUDGMENT AND PERMANENT INJUNCTION

Plaintiffs and Defendant Chris Thompson, hereby stipulate and move that this Court should enter a Judgment and Permanent Injunction in favor of Plaintiffs and against Defendant Thompson, as follows:

1. Defendant Thompson acknowledges that he has been properly and validly served with the Summons and Complaint in this action, or has waived such service. Defendant Thompson further consents to continuing jurisdiction of the Court for purposes of enforcement of the Judgment and Permanent Injunction, and irrevocably and fully waives and relinquishes any argument that venue or jurisdiction by this Court is improper or inconvenient.

2. Defendant Thompson shall pay damages to Plaintiffs in the amount of One Hundred Thousand U.S. Dollars (US $100,000).

3. Defendant Thompson, and his agents, servants, employees, representatives, assigns, licensees, transferees, and all those acting in concert with Defendant Thompson, at his direction or within his control (collectively, "Thompson"):

(a) shall be immediately and permanently enjoined from directly, indirectly, contributorily, or vicariously infringing in any manner any copyright in any and all motion pictures, television programs or other copyrighted works (or portions thereof), whether now in existence or later created, in which any Plaintiff (and any parents, subsidiaries or affiliates of any Plaintiff) own or control an exclusive right under Section 106 of the United States Copyright Act, 17 U.S.C. § 106 ("Copyrighted Works"), including but not limited to, by:

(i) copying, reproducing, downloading, distributing, uploading, linking to, transmitting, or publicly performing any Copyrighted Work;

(ii) enabling, facilitating, permitting, assisting, soliciting, encouraging, or inducing any person or entity ("User"), via the BitTorrent network or any other peer-to-peer or file-trading network or other medium, (A) to copy, reproduce, download, distribute, upload, link to, transmit, or publicly perform any Copyright Work, or (B) to make any Copyrighted Work available for copying, reproduction, distribution, uploading, linking to, transmitting, or public performance; and

(b) shall disable and prevent Users of any website, server, hardware, software, or any other system or service owned, controlled, operated, or distributed by Thompson, presently or in the future, including without limitation the computer servers and websites that make up Niteshdw operated by Thompson as part of the BitTorrent network (collectively, the "Niteshdw System"), from copying, reproducing, downloading, distributing, uploading, linking to, transmitting, or publicly performing any Copyrighted Work; and

(c) shall affirmatively monitor and patrol for, and preclude access to, the Copyrighted Works on, over, through, or via the Niteshdw System, to the extent it remains operational, including without limitation, by employing technological tools and measures to carry out such obligations; and

(d) if necessary to be in complete and strict compliance with any provision herein, shall cease and desist from operating the Niteshdw System, until such time that Thompson implements measures that prevent any and all copying, reproduction, downloading, distributing, uploading, linking to, transmitting, or public performance of the Copyright Works by Users of

the Niteshdw System; and

(e) shall not operate or assist in the operation of any computer server or website in any way related to the BitTorrent network or any other peer-to-peer or file-trading network or other medium that enables, facilitates, permits, assists, solicits, encourages, or induces the copying, reproduction, downloading, distributing, uploading, linking to, transmitting, or public performance of any of the Copyrighted Works.

4. This injunction shall not apply to any Copyrighted Works for which Thompson has obtained an appropriate written license from the Plaintiff that owns or controls the rights to such work, to the extent such license remains in force and valid.

5. Defendant Thompson shall promptly turn over to Plaintiffs copies of all data, logs and information on all computer servers that were used in connection with the Niteshdw System that are currently in his possession, custody, or control. Thereafter, Defendant Thompson shall destroy all torrent files representing any Copyrighted Works, as well as all data in any way related to his operation of Niteshdw, and shall provide Plaintiffs with a sworn statement within five days after the entry of the Judgment and Permanent Injunction certifying his compliance with this provision.

6. If Defendant Thompson sells, leases, conveys, transfers, or assigns any part of the software, source code, object code, other technology, domain names, trademarks, brands, or goodwill in any way used in the operation of the Niteshdw System, he will require, as a condition of any such transaction, that the purchaser, lessee, transferee, or assignee (a) submit to the Court's jurisdiction and venue, (b) agree to be bound by the terms herein, and (c) apply to the Court for an order adding them as a party to the permanent injunction entered by the Court against

Defendant Thompson.

7. Without limiting the generality of any of the foregoing, Thompson shall not publicly release, distribute or give away, for consideration or otherwise, any software, source code, object code, other technology, domain names, trademarks, brands, or goodwill in any way related to, or used in connection with, the Niteshdw System, including without limitation, by posting such materials on an Internet web page or by offering such materials over any peer-to-peer or file-trading network or other medium. Nothing in this provision shall prohibit Defendant Thompson from entering into a private commercial transaction to transfer such materials, *provided* that any such transfer complies with the provisions of paragraph 6 above.

8. Defendant Thompson irrevocably and fully waives notice of entry of the Judgment and Permanent Injunction, and notice and service of the entered Judgment and Permanent Injunction, and understands and agrees that violation of the Judgment and Permanent Injunction will expose Defendant Thompson to all penalties provided by law, including for contempt of Court.

9. Defendant Thompson irrevocably and fully waives any and all right to appeal the Judgment and Permanent Injunction, to have it vacated or set aside, to seek or obtain a new trial thereon, or otherwise to attack in any way, directly or collaterally, its validity or enforceability.

10. Nothing contained in the Judgment and Permanent Injunction shall limit the right of Plaintiffs to recover damages for any and all infringements by Defendant Thompson of Plaintiffs' Copyrighted Works occurring after the date Defendant Thompson executes this stipulation for entry of Consent Judgment and Permanent Injunction.

11. Defendant Thompson acknowledges that he has read this Consent Judgment and Permanent Injunction, has had it explained by counsel of Defendant Thompson's choosing, or has had the opportunity to do so, and fully understands it and agrees to be bound thereby.

JUDGMENT AND PERMANENT INJUNCTION

Having duly considered the stipulation of the Parties, and the proceedings in this Action, the Court orders that the Judgment and Permanent Injunction above shall be entered as the final judgment of this Court. There being no just reason for delay, the Clerk of the Court is hereby directed to enter this Judgment and Permanent Injunction pursuant to Rule 54 of the Federal Rules of Civil Procedure.

SO ORDERED, this 9th day of August, 2006.

Dale A. Kimball
United States District Judge

AGREED:

July 31 , 2006

/s/ Mark E. Hindley
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On Behalf of Plaintiffs Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios LLLP, and Universal City Studios Productions LLLP

/s/ Chris Thompson (signed with permission)
Mr. Chris Thompson

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH CENTRAL DIVISION

REBA D. JENKINS **Plaintiff,** **vs.** **JO ANNE B. BARNHART, Commissioner of Social Security,** **Defendant.**	**ORDER GRANTING DEFENDANT'S MOTION FOR EXTENSION OF TIME** **Case No. 2:06-CV-00163 PGC**

Based on the defendant's unopposed motion for a time extension, the court orders that the defendant file a response to the plaintiff's memorandum on or before September 15, 2006. The plaintiff may file a reply, if any, on or before October 2, 2006. The court GRANTS the defendant's Motion for Extension of Time (#7).

SO ORDERED.

DATED this 9th day of August, 2006

Paul G. Cassell
United States District Judge

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ATTORNEY FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH CENTRAL DIVISION

DISABLED RIGHTS ACTION COMMITTEE, ("DRAC"), a non profit corporation; and **BARBARA TOOMER,**

Plaintiffs,

vs.

JORDAN SCHOOL DISTRICT, a governmental entity; **BARRY L. NEWBOLD,** Superintendent, Jordan School District; **PEGGY JO KENNETT,** President, Jordan School District Board of Education; **RICK CONGER,** Director, Maintenance Services; **D. BURKE JOLLEY,** Deputy Superintendent of Business Services; **JOHN DOES I-V,** and **JANE DOES VI-X,**

Defendants.

ORDER

SETTLEMENT STIPULATION

SO ORDERED

Dale A. Kimball

DALE A. KIMBALL
United States District Judge

Date August 9, 2006

Case No. 2:06-CV-00235

Hon. Dale A. Kimball

THE PARTIES TO THE ABOVE MATTER by and through counsel, in full settlement of this matter stipulate and agree as follows:

1. Defendants caused a survey to be conducted of the parking lots of the schools and other district buildings within Jordan School District to determine compliance with the requirements of the Americans with Disabilities Act ("ADA").

2. The survey of the parking lots is attached to this Stipulation. That survey listed the number of accessible spaces in each lot, as well as the changes that should be made to bring each lot into compliance with the ADA.

3. The changes, additions and alterations referred to in Defendants' Survey shall be completed on or before November 1, 2006. On or before November 15, 2006, defendants shall file with the court and serve upon plaintiffs' counsel a detailed affidavit setting forth the items as listed in Defendants' Survey and their completion.

4. Defendants shall pay to the plaintiffs for the use and benefit of plaintiffs' counsel the sum of $1,750.00 for reasonable attorney fees and court costs incurred herein.

5. Upon completion of the requirements of the two (2) items above, this matter may be dismissed with prejudice.

6. The court may enter an order embodying this agreement.

DATED this 4th day of AUGUST 2006.

FABIAN & CLENDENIN
Attorneys for Defendants

/s/ John Robson[1]
by _____
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P.O. Box 510210
Salt Lake City, Utah 84151

UTAH LEGAL CLINIC
Attorney for Plaintiffs

/s/ Brian M. Barnard
by _____
BRIAN M. BARNARD
214 East 500 South Street
Salt Lake City, Utah 84111-3204

[1] A signed copy of document bearing the original signature of JOHN ROBSON is being maintained in the office of BRIAN M. BARNARD.

/s/ BRIAN M. BARNARD

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BIG SKY NETWORK CANADA, LTD., a British Virgin Islands corporation, Plaintiff, vs. SICHUAN PROVINCIAL GOVERNMENT, a subdivision of the People's Republic of China, a foreign state, and QINGYANG DISTRICT GOVERNMENT, a subdivision of the People's Republic of China, a foreign state, Defendants.	ORDER GRANTING MOTION FOR ENLARGEMENT OF REMOVAL PERIOD Case No. 2:06-CV-00265 PGC

Pursuant to 28 U.S.C. § 1441(d), defendants Sichuan Provincial Government and Qingyang District Government move to enlarge the period for removal of this action brought by plaintiff Big Sky Network Canada, Ltd., in Utah state court. Plaintiff Big Sky opposes the motion. Because defendants have shown cause for an enlargement, the court grants defendants' motion.

BACKGROUND

Big Sky, a British Virgin Islands corporation, in Utah state court filed a complaint in June 2005, alleging intentional interference with contractual relations and unjust enrichment claims against defendants. In particular, plaintiff alleges that defendants interfered with a joint venture entered into by plaintiff and Chengdu Huayu Information Industry Co., Ltd., to provide cable and internet services in Sichuan Province and Qingyang District. On March 30, 2006, defendants Sichuan and Qingyang moved to extend the 30-day period for removal pursuant to 28 U.S.C. § 1441(d) to proceed with this action in federal court, which motion is now before the court.

Sichuan and Qingyang are political subdivisions of the People's Republic of China, a sovereign foreign state. On or about August 22, 2005, Big Sky first attempted to serve defendants pursuant to the terms of the Hague Convention. However, on or about October 10, 2005, the Ministry of Justice of the People's Republic of China returned the service materials to Big Sky on the basis that they did not comply with the terms of the Hague Convention and that execution of the request would infringe the sovereignty or security of the People's Republic of China.

On February 6, 2006, the United States Embassy in Beijing transmitted to the Ministry of Foreign Affairs of the People's Republic of China copies of the Summons, the Complaint filed in this action, and a Notice of Suit prepared by Big Sky, including Chinese copies of each document. Defendants concede that for purposes of this motion, the Summons, Complaint, and Notice of Suit were properly served on defendants on February 6, 2006.

DISCUSSION

In general, a defendant must move to remove a case to federal court "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based."[1] However, the Foreign Sovereign Immunities Act (FSIA) provides an exception to this 30-day removal period to promote "Congress' objective of uniformity in the law and impartiality toward [a] foreign entity."[2] This exception provides, in relevant part, that "[a]ny civil action brought in a State court against a foreign state . . . may be removed by the foreign state to the district court of the United States" and that "[w]here removal is based upon this subsection, the time limits of section 1446(b) of this chapter *may be enlarged at any time for cause shown*."[3]

In the present case, defendants Sichuan and Qingyang fall under the FSIA's definition of a "foreign state" because they are political subdivisions of the People's Republic of China.[4] Accordingly, defendants Sichuan and Qingyang are entitled to remove the action brought in state court by plaintiff Big Sky *at any time* after the usual 30-day period for removal has expired provided that defendants show "cause" for the delay.

In making the "cause" determination, courts routinely consider factors such as the length of the delay in filing for removal to federal court, "the [underlying] purpose of the removal

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[1] 28 U.S.C. § 1446(b).

[2] *Leith v. Lufthansa German Airlines*, 793 F. Supp. 808, 811 (N.D. Ill. 1992).

[3] 28 U.S.C. § 1441(d) (emphasis added).

[4] *See* 28 U.S.C. § 1603(a) (providing that "a 'foreign state' . . . includes a political subdivision of a foreign state").

statute, the extent of prior activity in the state system, the prejudice to both parties, the effect on the substantive rights of the parties and any intervening equities."[5] To rule on defendant's motion in this case, the court must determine (1) when service was executed to determine when defendants' 30-day removal period commenced and expired, and (2) whether defendants have shown "cause" to extend the removal period beyond the usual 30-day removal period.

I. Defendants Sichuan and Qingyang were served with the Summons and Complaint on February 6, 2006, whereupon the 30-day period for removal commenced.

The parties disagree as to when defendants were served. Plaintiff argues that service was effectuated in August 2005 under the provisions of the Hague Convention. Defendants contend that service did not occur in August 2005 because that attempt was rejected by the Ministry of Foreign Affairs. For purposes of this motion, defendants concede that service occurred on February 6, 2006.

To facilitate deciding whether defendants have shown "cause" to extend the removal period, the parties' disagreement as to when service occurred must be resolved. The parties' briefs clearly show that defendants were first served with the Summons and Complaint on February 6, 2006. Defendants' 30-day removal period therefore began to run on this date. The 30-day period therefore expired on March 8, 2006.

Plaintiff contends, however, that defendants were served in August 2005 under the FSIA's service provisions, which provide that service shall be effected upon a foreign state or

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[5] *Refco, Inc. v. Galadin*, 755 F. Supp. 79, 83 (S.D.N.Y. 1991); *see also Leith*, 793 F. Supp. at 811.

political subdivision of a foreign state "by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents."[6] In accord with the Hague Convention, Big Sky sent a request for service and all necessary documents to China's designated central authority, the Bureau of International Judicial Assistance, Ministry of Justice of the People's Republic of China. Plaintiff argues that because China is a signatory to the Hague Convention, this request for service constitutes adequate service.

However, it is clear that this request for service did not result in actual service upon defendants. After receiving the necessary documents, the Ministry of Justice rejected and returned the materials to plaintiff. Although defendants are political subdivisions of the People's Republic of China, a request to the Ministry of Justice that they be served, absent actual service upon defendants, does not satisfy the Hague Convention service requirements. If the Ministry of Justice "deems that compliance [with the request for service] would infringe the sovereignty or security" of the foreign state, then they may reject the request.[7] Alternatively, the Ministry of Justice could grant the request by "itself serv[ing] the document or . . . arrang[ing] to have it served by an appropriate agency . . . by a method prescribed by its internal law for service of documents."[8] By rejecting plaintiff's request for service upon defendants, China's Ministry of

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[6]28 U.S.C. § 1608(a)(2).

[7]Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 ("Hague Convention"), art. 13.

[8]*Id.*, arts. 4, 5(a).

Justice prevented defendants from being served. As defendants note, a request for service is not equivalent to actual service. Further, plaintiff has conceded that the August 2005 service attempt was unsuccessful. In a motion filed with the state court to enlarge the service period following the August 2005 attempt, plaintiff expressly stated that "neither defendant in this action has been served yet."

Plaintiff also contends that the 30-day time limit for removal began to run when the Ministry of Justice (not these defendants) received notice of the case in late August 2005, even if that was not valid service. Plaintiff argues that under the FSIA's "through service *or otherwise*"[9] language, the 30-day removal period began to run in the absence of proper service. However, the Supreme Court has held "the a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service."[10] Absent actual service, the 30-day period for removal cannot commence. In this case, plaintiff's rejected request for service in August 2005 does not satisfy the provisions of 28 U.S.C. § 1446(b).

Upon notification that the request for service had been rejected, plaintiff sought to effectuate service under the FSIA via the United States Secretary of State. Service can be effected upon a foreign state "by sending two copies of the summons and complaint and a notice

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[9] 28 U.S.C. § 1446(b) (emphasis added).

[10] *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 348 (1999) (emphasis added).

of suit, together with a translation of each into the official language of the foreign state . . . to the Secretary of State . . . and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state."[11] Defendants concede, for purposes of this motion, that plaintiff's second attempt at service did indeed result in actual service on February 6, 2006. Accordingly, the time for removal did not begin to run until that date.

II. Defendants Sichuan and Qingyang have met their burden of demonstrating "cause" for removing the present case to federal court after the expiration of the 30-day time limit.

As a threshold matter, this court must determine whether defendants Sichuan and Qingyang are required to submit detailed evidence showing sufficient "cause" for extending the removal period. Plaintiff contends defendant must submit detailed evidence in the form of documents or affidavits which provide proof of "cause." However, plaintiff fails to cite any authority requiring such evidence. In this case, the court accepts defendants' good-faith representations showing "cause" as sufficient.

Considering the relevant factors in light of the circumstances of this case, defendants have provided the court with ample "cause" to justify an extension of the removal period. First, given that service did not occur until February 6, 2006, the length of delay in filing for removal to federal court was only three weeks. This stands in stark contrast to the cases in which an extension for removal was denied due to delays of several years.[12] Additionally, defendants

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[11] 28 U.S.C. § 1608(a)(4).

[12] *See, e.g., Hyundai Corp. v. Republic of Iraq*, No. 02 Civ. 7199 (RCC), 2003 WL 22251349, *3 (S.D.N.Y. Sep. 30, 2003) (finding no "cause" where defendants delay was more than four and one-half years); *Boskoff v. The Boeing Co.*, No. 83 Civ. 2756 (IBW), 1984 WL

have provided sufficient explanation for such a minimal delay: defendants are foreign sovereigns that are unfamiliar with United States civil procedures (including the perceived discrepancy between the 60-day response to complaint period[13] of which the defendants were aware at the time of service and the 30-day removal provision[14] of which defendants were not aware of until the time had already expired); obvious language and translation issues contributed to the delay; and defendants understandably conferred with counsel regarding the implications of the pending suit and the validity of service.

Second, the court considers Congress' purpose in enacting § 1441(d). The legislative history shows that Congress enacted this statute both "to allow for a uniform body of law concerning foreign states to emerge in the federal courts"[15] and to provide "impartiality toward [foreign entities]."[16] Granting defendants' motion for enlargement of the removal period will promote the fundamental interests that the FSIA was designed to secure.

Third, the court considers the extent of prior activity in the state court system to prevent forum-shopping and the waste of judicial resources. Several courts have denied the extension of the removal period because the defendants had extensively litigated the case in state court before

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1066, *3 (S.D.N.Y. Oct. 19, 1984) (finding no "cause" where defendants sought to enlarge removal period by more than five years).

[13] *See* 28 U.S.C. § 1608(d).

[14] *See* 28 U.S.C. § 1446(b).

[15] *Refco*, 755 F. Supp. at 83.

[16] *Leith*, 793 F. Supp. at 811.

requesting removal to federal court.[17] Allowing for removal at such a late stage in the litigation process would waste limited judicial resources and would allow for forum shopping. This is not the case in the present suit. After receiving the Complaint, defendants' first and only action in this litigation has been to file a motion to enlarge the removal period. Additionally, there is no evidence that defendants are engaging in forum shopping.

Fourth, defendants would be prejudiced by the denial of a removal period extension. As discussed, Congress desires that civil cases involving foreign states and their subdivisions be litigated in the federal courts to ensure uniformity in the law and proper treatment of foreign sovereigns. Accordingly, Congress has enacted an exception to the 30-day removal period. Provided that defendants show "cause," this is the exact type of situation that Congress intended § 1441(d) to encompass. Denying the defendants the ability to use this statute would be prejudicial to their rights under United States law.

Finally, plaintiff's substantive rights would not be adversely affected by enlarging the removal period at this time. After all, defendants could have removed this case to federal court as a matter of right up until three weeks prior to the filing of this motion. Plaintiff has not shown any adverse affects to their substantive rights.

Plaintiff relies on cases that are distinguishable from the present case and that do not persuade the court to deny defendants' motion to enlarge the removal period. For example, in *Boland v. Bank Sepah-Iran*, the court stated that "[a] showing of cause to justify an extension of

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[17] *See, e.g.,* *Boland v. Bank Sepah-Iran*, 614 F. Supp. 1166, 1169 (S.D.N.Y. 1985) (denying extension where defendant attempted to remove after actively litigating in state court nearly five years and had been denied motions to dismiss and for summary judgment).

the section 1446(b) time requirement is rarely found" and that "defendant must demonstrate some unusual set of circumstances."[18] However, in *Boland* the defendant requested removal nearly five years after the removal period had expired, and only after state court denials of motions to dismiss and for summary judgment. No unusual circumstances exist in the present case. No other motions have been filed (other than this motion to extend the removal period) and the delay has been minimal.

In addition, the court in *Ponce v. Alitalia Linee Airee* states that the "cause" requirement must "connote some proof of a justification other than the extended pleading period that is automatically conferred on the foreign state by Section 1608(d). And that added showing must be meaningful in substantive terms."[19] Unlike in *Ponce*, defendants have not merely relied on their status as foreign states. Instead, defendants have provided the court with an extensive list of reasons for their three week delay in filing for removal. In addition to their status as foreign sovereigns and the difficulty that brings in retaining counsel familiar with United States removal procedures, defendants needed time to analyze the pleadings, verify with Chinese counsel the legal implications of the suit, and obtain American counsel.[20] Additionally, obvious language and translation issues led to the minor delay.

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[18] *Boland*, 614 F. Supp. at 1169.

[19] *Ponce v. Alitalia Linee Airee*, 840 F. Supp. 550, 551 (N.D. Ill. 1993).

[20] *See* *Tennessee Gas Pipeline Co. v. Continental Casualty Co.*, 814 F. Supp. 1302 (M.D. La. 1993) (the court found sufficient "cause" when defendant investigated plaintiff's suit and evaluated the service of process); *Lopez del Valle v. Gobierno de la Capital*, 855 F. Supp. 34 (D. P.R. 1994) (the court found "cause" based on the time defendants needed to communicate with counsel).

CONCLUSION

The court HEREBY ORDERS that defendants' Motion for Enlargement of the Removal Period (#3) is GRANTED. Accordingly, the court further ORDERS that defendants' Notice of Removal (#1) was therefore timely filed and this matter was timely removed on March 30, 2006.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

NUTRACEUTICAL CORPORATION, a Delaware corporation, Plaintiff, v. INTERNATIONAL PIGMENT & COLOR CORPORATION, a Florida corporation, Defendant.	[PROPOSED] STIPULATED PROTECTIVE ORDER Case No. 2:06cv00455 PGC Judge Paul G. Cassell

The discovery, pretrial and trial phases of this action may involve disclosure of trade secrets and other confidential and proprietary business, technical and financial information. For good cause shown,

IT IS HEREBY ORDERED that:

1. Any party to this action, and any non-party from whom discovery is sought in connection with this action, may designate as "Subject to Protective Order" and

"Confidential – Outside Counsel Eyes Only"

or

"Confidential"

any documents, things, interrogatory answers, responses to request for admissions, trial or deposition testimony, or other material that contains material or information that is not publicly known which is produced in this litigation by one party to the other including, without limitation, confidential business information, confidential technology, trade secrets, know-how, proprietary data, confidential research, development or commercial information including, but not limited to, production, sales, shipments, purchases, transfers, identification of customers, inventories, amount or source of any income, profits, losses, or expenditures, agreements, contracts, job information, invoices, orders, things, notes, outlines, compilations, memoranda, operating manuals or instructions, correspondence, reports, records, data, charts, specifications, designs, flowcharts, and software and other written, recorded or graphic material, and which is designated as confidential in the manner described in this Order ("Protected Information"). Protected

Information includes all such confidential information, whether revealed during a deposition, in a document, in an interrogatory answer, by production of tangible evidence, hearing or trial transcripts, responses to requests for admissions or otherwise made available to counsel for either party in this action.

2. *"Confidential – Outside Counsel Eyes Only"* and *"Confidential"* material, as used in this Order, shall refer to any Protected Information designated pursuant to paragraph 1 above, and all copies thereof, and shall also refer to the information contained in or derived from material designated pursuant to paragraph 1 above, including excerpts, summaries, indices, abstracts, or copies of such material.

3. No designation of materials as *"Confidential – Outside Counsel Eyes Only"* shall be made unless: (a) the designating party or non-party believes in good faith that the designated material is Protected Information and entitled to protection under Rule (26(c)(7) of the Federal Rules of Civil Procedure; and (b) the designated material comprises or contains confidential, highly sensitive technical, marketing, financial, sales or other business information which could be used by the receiving party to obtain a business (not legal) advantage over the producing party.

4. No designation of material as *"Confidential"* shall be made unless the designating party or non-party believes in good faith that the designated material is Protected Information and entitled to protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure.

5. Outside counsel of the respective parties, including secretarial, clerical, investigative, litigation support and paralegal personnel regularly employed by such outside counsel may receive Protected Information designated "Confidential" or "Confidential – Outside Counsel Eyes Only." As used herein, "outside counsel" shall mean in the case of International Pigment & Color Corp., attorneys from the firm Workman Nydegger, P.C., and in the case of Nutraceutical Corp., attorneys from Tomsic & Peck LLC.

6. Translators of foreign language documents or foreign language testimony who are not employed by one of the parties, but are retained to provide translations of any material or testimony designated as *"Confidential"* or *"Confidential – Outside Counsel Eyes Only,"* may receive materials so designated, but only for purposes of translating such documents or testimony.

7. Third parties, who are not affiliates of or employed by one of the parties, but are specifically retained to assist the attorneys of record or a party in copying or computer coding or imaging of documents, may receive materials designated *"Confidential"* or *"Confidential – Outside Counsel Eyes Only,"* but only for purposes of copying or computer coding or imaging Protected Information contained therein.

8. The Court and its employees and court stenographers whose function requires them to have access to material designated as *"Confidential"* or *"Confidential – Outside Counsel Eyes Only"* may receive such materials, but only for purposes of discharging the function which requires them to have access thereto.

9. Independent outside experts and their clerical and support staff specifically engaged by counsel or the parties to assist in this litigation may receive Protected Information designated *"Confidential"* or *"Confidential – Outside Counsel Eyes Only,"* subject to the provisions of paragraphs 11 and 12 below.

10. Up to five (5) employees, officers or directors of the parties may be designated and permitted to receive Protected Information designated *"Confidential,"* subject to the provisions of paragraphs 11 and 12 below.

11. Before any disclosure of Protected Information is made pursuant to paragraphs 9 or 10 above, the following must occur:

(a) the individual to whom disclosure is to be made must be given a copy of this Order, and the provisions of this Order must be explained to the individual to whom disclosure is to be made by an attorney;

(b) the individual to whom disclosure is to be made must sign an undertaking in the form of the attached Exhibit A;

(c) if the individual to whom disclosure is to be made is an expert, a copy of the signed undertaking, a curriculum vitae of the proposed expert, and an identification of any past or present employment or consulting relationship with any party or any related company, must be served by facsimile on opposing counsel of record at least ten (10) business days before the Protected Information is shown to such an expert; and

(d) if the individual to whom disclosure is to be made is not an expert, or is an employee of either party, a copy of the signed undertaking and an identification of the employee, officer, or director, including all of their titles and responsibilities, must be served by facsimile on opposing counsel of record at least ten (10) business days before the Protected Information is shown to such employee, officer, or director.

12. Any party may object to the disclosure of Protected Information pursuant to paragraphs 9 or 10 above, within (7) business days of receiving all of the information required to be provided by subparagraph 11(c) or 11(d). The procedure for making and resolving any such objection shall be as follows:

(a) Any objection made pursuant to this paragraph 12 must be in writing and state the reasons for such objection;

(b) After written objection is made, no disclosure of Protected Information shall be made to that employee, officer, director or expert until the matter is resolved by the Court or upon agreement of the parties;

(c) Within ten (10) business days after service of said objection, the objecting party may move the Court for an order denying disclosure of any such Protected Information to any such employee, officer, director or expert as to whom a notice of objection had been served, and failure to timely file such a motion shall operate as a waiver of objection to the disclosure of Protected Information to the employee, officer, director or expert concerning whom the objection was made;

(d) The party seeking to disclose Protected Information to the individual concerning whom an objection is made shall have ten (10) business days to file an opposition to any motion filed pursuant to the foregoing subparagraph 12(c);

(e) Upon motion and briefing as set forth in the foregoing subparagraphs 12(c) and 12(d), the Court shall then make a determination without further briefing, submission or hearing unless expressly ordered by the Court.

13. Notwithstanding the other provisions of this Order, Protected Information may be used in the course of any deposition of current employees of the party designating such Protected Information.

14. Notwithstanding the other provisions of this Order, any party or third-party witness may be shown at a deposition or examined on any document containing material designated *"Confidential"* or *"Confidential – Outside Counsel Eyes Only"* if it appears from the face of the document that the witness authored or received a copy of it, or if it is reasonably established that the witness has knowledge of information which is contained in the document and about which the witness is being examined.

15. In the event that counsel for either party deems it necessary to disclose Protected Information to an officer, employee or agent of their client other than those to whom disclosure is provided for in this Order, the parties agree to negotiate in good faith whether such disclosure may occur and the terms on which such disclosure can occur. In the event the parties are unable to agree, the party seeking disclosure may make application to the Court for such disclosure.

16. Until or unless the Court rules otherwise, Protected Information and any information derived therefrom, including excerpts, summaries, indices, abstracts or copies thereof, shall be maintained in confidence by the person to whom such material is produced and shall not be disclosed to any person without the express written consent, or consent on the record, of the producing party, except as set forth above.

17. Any person to whom Protected Information is divulged pursuant to the provisions of this Order is similarly obligated to maintain the confidence of such Protected Information, and not to disclose it to any person other than a person authorized under this Order. All produced Protected Information shall be carefully maintained so as to preclude access by the officers, employees and agents of either party other than those otherwise authorized under this Order.

18. Protected Information shall not be used for any purposes other than this litigation.

19. Any redaction of confidential information, not agreed to by both parties or ordered by the court, shall be accompanied by a notification indicating that the redaction has been made and shall further provide the reasoning for the redaction.

20. In the event a producing party or a third party elects to produce documents or other material for inspection, no markings need be made by the producing party or third party in advance of the inspection. All such documents or other material may be temporarily designated as *"Confidential"* or *"Confidential – Outside Counsel Eyes Only"* and shall be treated by the receiving party as if they were so

marked. After selection by the receiving party of specified documents or material for copying, the producing party without delay shall make its designation under this Order, if any, and the party making copies shall ensure that any copies include any designation made by the producing party.

21. Except as otherwise provided herein, no designation shall be effective unless there is placed or affixed on such material a *"Confidential – Outside Counsel Eyes Only"* or *"Confidential"* marking, or unless the parties agree upon some other appropriate methods of designation. The designations *"Highly Confidential Attorneys Eyes Only," "Confidential Attorneys Eyes Only" or "Attorneys Eyes Only"* shall have the same meaning and effect as the designation *"Confidential – Outside Counsel Eyes Only."*

22. All Protected Information not reduced to documentary, tangible or physical form, or which cannot be conveniently designated pursuant to the foregoing paragraph 21, shall be designated by the producing party by informing the opposing party in writing.

23. Depositions or portions thereof which contain Protected Information may be designated as *"Confidential"* or *"Confidential – Outside Counsel Eyes Only"* and shall be separately bound in a confidential volume, marked in accordance with paragraph 1, and shall, if required, be separately filed as provided herein so as to distinguish such confidential deposition or confidential portions thereof from non-confidential public depositions or public portions thereof.

24. All testimony given at a deposition and each transcript of a deposition shall be presumptively treated as *"Confidential – Outside Counsel Eyes Only"* for a period of fourteen (14) calendar days following the deponent's counsel's receipt of the transcript of the deposition from the reporter. Within that fourteen (14) day period, counsel for any party or the deponent may designate certain pages of the transcript as *"Confidential"* or *"Confidential – Outside Counsel Eyes Only"* by notifying counsel for each party and the deponent in writing of such pages, and only those portions will thereafter be handled and marked in accordance with the provisions of this Order. If no designation is made within that fourteen (14) day period, the transcript shall be considered not to contain Protected Information. The provisions of this paragraph shall not, however, operate to exclude a party's representative, not authorized to receive Protected Information, from any part of a deposition except when counsel for a party deems that a question and/or the answer to a question will result in disclosure of Protected Information. Only individuals otherwise authorized to receive such Protected Information under the terms of this Order will be allowed to attend confidential portions of depositions.

25. Material and deposition transcripts produced without the designation of *"Confidential – Outside Counsel Eyes Only"* or *"Confidential"* may be so designated subsequent to production or testimony if the producing party provides replacement materials bearing appropriate designations and notifies the receiving party promptly after becoming aware of same that the producing party failed to make such designation

at the time of production, during the testimony, or during the twenty-one (21) day period after receipt of the transcript through inadvertence, mistake, or error. If discovery material is designated *"Confidential"* or *"Confidential – Outside Counsel Eyes Only"* subsequent to production or testimony, the receiving party promptly shall collect any copies that have been provided to individuals other than those authorized to receive Protected Information so designated under this Order, and shall affix the appropriate designation to any copies that have been provided to individuals authorized to receive Protected Information so designated under this Order.

26. The failure by any party to object to the designation of discovery material as Confidential Material at the time of its designation shall not be deemed a waiver of that party's right to challenge the propriety of such designation at any time thereafter. Should counsel object to the designation by a party of any discovery material as Protected Information, counsel shall notify the designating party's counsel of the objections in writing and shall request the designating party to rescind the designation, referring specifically to the discovery material objected to. Counsel shall promptly confer in an attempt to resolve the matter. If the matter remains unresolved, counsel designating the discovery material as Protected Information may then apply to the Court for a determination of whether the designated material can properly be designated as Protected Information under paragraphs 1 through 4 of this Order and applicable federal law. The designating party must file such a motion within fourteen (14) days after conferring with objecting counsel or the designation and right to designate relative to the

discovery material at issue is waived and is no longer deemed Protected Information. The designating party shall bear the burden of establishing the need for the *"Confidential – Outside Counsel Eyes Only"* or *"Confidential"* designation.

27. If in the course of this litigation discovery is sought from third parties which would require such parties to disclose and/or produce *"Confidential"* or *"Confidential – Outside Counsel Eyes Only"* information, such third parties may gain the protections of this Order by simply agreeing in writing to produce documents pursuant to this Order and to be bound by it. No further order of this Court shall be necessary to extend the protections of this Order to third parties.

28. A party who contemplates disclosure of Protected Information requested in a validly served subpoena, civil investigative demand, discovery procedure permitted under the Federal Rules of Civil Procedure or other formal discovery request shall give notice of such request in writing to the party that designated the materials as such, as soon as is reasonably possible, to permit the designating party an opportunity to appear and be heard in connection with any motion or request to a court to order production of such Protected Information.

29. Within thirty (30) days after the conclusion of the above-entitled action, including, without limitation, any appeal or retrial, all Protected Information and all materials designated *"Confidential"* or *"Confidential – Outside Counsel Eyes Only"* pursuant to this Order, produced as part of discovery in this action, and all copies thereof, shall be returned to the producing party or, at the option of the receiving party,

receiving counsel shall destroy and certify in writing that such material has been destroyed. Outside counsel may retain one copy of any material containing Protected Information marked *"Confidential"* or *"Confidential – Outside Counsel Eyes Only"* and one copy of counsel's work product incorporating such Protected Information, which shall remain subject to the provisions of this order.

30. Any document or thing containing or embodying Protected Information that is to be filed or submitted in this action shall be filed or submitted in accordance with the official procedures of the Court, if no such procedures are provided by the Court, the documents or things containing or embodying Protected Information shall be filed in sealed envelopes or other sealed containers which shall bear the caption of the case, shall identify the contents for docketing purposes, shall bear a statement substantially in the form:

CONFIDENTIAL

> Filed under Protective Order. This envelope is not to be opened nor the contents thereof displayed or revealed except by direction or Order of the Court, or by agreement of the parties.

Subject to applicable local rules, outside attorneys of record and local counsel for the parties are hereby authorized to be the persons who may retrieve confidential exhibits and/or other confidential matters filed with the Court upon termination of this litigation without further order of this Court, and are the persons to whom such confidential exhibits or other confidential matters may be returned by the Clerk of the Court, if they

are not so retrieved. No material or copies thereof so filed shall be released except by order of the Court, to outside counsel of record or as otherwise provided for hereunder.

31. The restrictions set forth in any of the preceding paragraphs do not and shall not apply to information or material that:

(a) was, is or becomes public knowledge in a manner other than by violation of this Order;

(b) is acquired by the non-designating party from a third party having the right to disclose such information or material; or

(c) was lawfully possessed by the non-designating party prior to the entry by the Court of this Order.

32. Nothing in this Order shall bar or otherwise restrict any attorney herein from rendering advice to his client with respect to this litigation and in the course thereof, relying upon the attorney's examination of Protected Information; provided, however, that in rendering such advice and in otherwise communicating with his client, the attorney shall not disclose any Protected Information.

33. Any discovery documents produced in this litigation may be later designated as "Attorney Client Privileged" or "Attorney Work Product" promptly upon discovery by the producing party that any such privileged or immune document was produced through inadvertence, mistake, or other error, and no waiver or privilege or immunity shall be deemed to have occurred. Upon such designation, the receiving attorney promptly shall make best efforts to collect all copies of the documents and

return them to the producing party. In the event that the receiving attorney believes in good faith that the producing party cannot properly assert any privilege or immunity with respect to the documents, the receiving attorney must notify the designating attorney in writing and the designating attorney shall within thirty (30) days of such notice file a motion to establish that the material is attorney-client privileged; otherwise, the claim of privilege shall be deemed waived.

34. This Order shall be without prejudice to the right of any party to oppose production of any information for any reason permitted under the Federal Rules of Civil Procedure.

35. This Order may be amended by the agreement of counsel for the parties in the form of a stipulation, subject to order of the Court. Any party for good cause may apply to the Court for a modification of this Order. This Order shall remain in full force and effect after the termination of this litigation, or until canceled or otherwise modified by order of this Court.

The foregoing is hereby stipulated by and between counsel.

Dated this 2nd day of August, 2006.

TOMSIC & PECK LLC

/s/ Kristopher S. Kaufman
Peggy A. Tomsic, Esq.
Kristopher S. Kaufman, Esq.
TOMSIC & PECK
Attorneys for Nutraceutical

WORKMAN & NYDEGGER

/s/ James B. Belshe
Charles L. Roberts
James B. Belshe
Workman & Nydegger
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

IT IS SO ORDERED: **BY THE COURT**

DATED: 8/9/06 By: _____
Hon. Judge Cassell

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

NUTRACEUTICAL CORPORATION, a Delaware corporation, Plaintiff, v. INTERNATIONAL PIGMENT & COLOR CORPORATION, a Florida corporation, Defendant.	Civil Action No. 2:06CV00455 **CONFIDENTIALITY UNDERTAKING RE STIPULATED PROTECTIVE ORDER** The Honorable Judge Cassell

I, _____, declare that:

My address is _____.

My present employer is _____.

My present occupation or job description is _____
_____.

I have received a copy of the Protective Order in this action signed by Judge Cassell on _____, _____.

I have carefully read and understand the provisions of the Protective Order.

I will comply with all of the provisions of the Protective Order.

I will hold in confidence, will not disclose to anyone not qualified under the Protective Order, and will use only for purposes of this action any confidential materials which are disclosed to me.

I will return all confidential material that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained.

I hereby submit to the jurisdiction of this Court for the purposes of enforcement of the Protective Order in this action.

DATED this _____ day of _____, 20___.

_____

(Signature)

_____

(Typed Name)

CHRISTINA J. SCHMUTZ (7301)
JEFFREY J. DROUBAY (9119)
PARSONS BEHLE & LATIMER
Attorneys for Countrywide Home Loans, Inc.
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
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Facsimile: (801) 536-6111

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

DEBRA S. ISAACS, Plaintiff, vs. COUNTRYWIDE HOME LOANS, INC., Defendant.	Case No. 2:06cv00556 DS **ORDER ON DEFENDANT'S UNOPPOSED MOTION TO EXTEND TIME TO ANSWER OR RESPOND TO COMPLAINT** Judge David Sam

The Court having reviewed Defendant Countrywide Home Loans, Inc.'s Stipulated Motion to Extend Deadlines, and good cause appearing,

IT IS ORDERED that the time for Defendant to answer or otherwise respond to Plaintiff's Complaint shall be extended by 20 days. Defendant shall file its answer or response on or before August 28, 2006.

DATED this 8th day of August, 2006.

David Sam

THE HONORABLE DAVID SAM
Senior United States District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ELMER LYNN WEST, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	ORDER DENYING MOTION FOR POST-CONVICTION RELIEF Case No. 2:06-CV-00589 PGC

This case is plaintiff Elmer Lynn West's second attempt to obtain post-conviction relief. His first attempt, *West v. United States of America*, case number 2:05cv00862 PGC in this district, was closed on February 28, 2006. The court denied his motion for relief in that case.[1]

Before the court may entertain a second motion for post-conviction relief, the defendant must comply with the applicable statutory requirements. In 28 U.S.C. § 2255, Congress set forth those requirements as follows:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have

[1] *See* Docket #7, *West v. United States of America*, Case No. 2:05-cv-00862 (D. Utah filed Feb. 28, 20006).

> found the movant guilty of the offense; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[2]

Mr. West has not provided the requisite certification from the Tenth Circuit. As such, the court may not entertain his second motion for post-conviction relief. The court therefore DENIES his motion (# 1). The clerk's office is directed to close the case.

SO ORDERED.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

[2]28 U.S.C. § 2255.

Dana D. Ball (UT Bar No. 9314)
ESPLIN │ WEIGHT
290 West Center Street
P.O. Box “L"
Provo, UT 84603-0200
(801) 373-4912
(801) 371-6964 Fax

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Stephanie Harrison, *Ms. Harrison,* v. C.H. Robinson Worldwide, Inc., *Defendant.*	)	CIVIL ACTON NO. 2:06-cv-621 **ORDER FOR PRO HAC VICE ADMISSION** Judge Ted Steward

It appearing to the Court that Petitioner meets the Pro Hac Vice admission requirements of DUCiv R 83-1.1(d), the motion for the admission Pro Hac Vice of Steven M. Sprenger in the United States District Court, District of Utah in the subject case is GRANTED.

Dated: This 9th day of August, 2006

Ted Stewart, U.S. District Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DENTSPLY INTERNATIONAL, INC., Plaintiff, vs. RYAN DOWNARD, Defendant.	ORDER REMANDING CASE TO STATE COURT Case No. 2:06-CV-00645 PGC

Defendant Ryan Downard filed a notice of removal in this case on August 3, 2006. The case was originally filed in the Third District Court in and for Salt Lake County, State of Utah as civil case number 060911373. Mr. Downard claims that he is entitled to removal based on 28 U.S.C. § 1441 because this is a civil action over which this court has original subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Section 1332 grants this court subject matter jurisdiction when the parties' citizenship is completely diverse.

This complete diversity requirement is met here because plaintiff Dentsply International, Inc. admits it is incorporated in Delaware; Dentsply admits its principal place of business is in York, Pennsylvania; and Mr. Downard admits he is a citizen of Utah. But based on defendant Mr. Downard's own admission that he is a citizen of Utah, removal is improper. As the Supreme Court said in *Caterpillar Inc. v. Lewis*:

> When a plaintiff files in state court a civil action over which the federal district courts would have original jurisdiction based on diversity of citizenship, the defendant or defendants may remove the action to federal court, *provided that no defendant* "*is a citizen of the State in which such action is brought*."[1]

Dentsply's complaint is a civil action over which this court would have original jurisdiction based on diversity of citizenship. If Dentsply would have filed the complaint in this court, jurisdiction would have been proper. Instead, Dentsply chose to originally file the complaint in Utah state court. Since defendant Mr. Downard is a citizen of the state in which the action was brought, 28 U.S.C. § 1441(b) precludes removal.

Federal district courts must sua sponte address their own subject matter jurisdiction.[2] The court holds that it lacks subject matter jurisdiction in this case. Accordingly, the court therefore ORDERS that this case be remanded to the Third District Court in and for Salt Lake County, State of Utah. The clerk's office is directed to close the case.

SO ORDERED.

DATED this 9th day of August, 2006.

BY THE COURT:

Paul G. Cassell
United States District Judge

[1]519 U.S. 61, 68 (1996) (quoting 28 U.S.C. § 1441(b)) (citation omitted) (emphasis added).

[2]*United States v. Lugo*, 170 F.3d 996, 1002 (10th Cir. 1999).

United States District Court

CENTRAL DISTRICT OF UTAH

UNITED STATES OF AMERICA
V.

ORDER SETTING CONDITIONS OF RELEASE

Nicholas Lowery

Case Number: WA-06-250 M

IT IS SO ORDERED that the release of the defendant is subject to the following conditions:

(1) The defendant shall not commit any offense in violation of federal, state or local or tribal law while on release in this case.

(2) The defendant shall immediately advise the court, defense counsel and the U.S. attorney in writing of any change in address and telephone number.

(3) The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed

as directed. The defendant shall next appear at (if blank, to be notified) _____
PLACE

_____ on _____
DATE AND TIME

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released provided that:

(✔) (4) The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed.

( ) (5) The defendant executes an unsecured bond binding the defendant to pay the United States the sum of

_____ dollars ($) _____

in the event of a failure to appear as required or to surrender as directed for service of any sentence imposed.

Additional Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant and the safety of other persons and the community, it is FURTHER ORDERED that the release of the defendant is subject to the conditions marked below:

( ) (6) The defendant is placed in the custody of:
(Name of person or organization)
(Address)
(City and state) (Tel.No.)
who agrees (a) to supervise the defendant in accordance with all the conditions of release, (b) to use every effort to assure the appearance of the defendant at all scheduled court proceedings, and (c) to notify the court immediately in the event the defendant violates any conditions of release or disappears.

Signed: _____
Custodian or Proxy

(X) (7) The defendant shall:
(X) (a) maintain or actively seek employment.
( ) (b) maintain or commence an educational program.
( ) (c) abide by the following restrictions on his personal associations, place of abode, or travel:

( ) (d) avoid all contact with the following named persons, who are considered either alleged victims or potential witnesses:

(X) (e) report on a regular basis to the supervising officer as directed. 1 personal visit a month.
( ) (f) comply with the following curfew:
(X) (g) refrain from possessing a firearm, destructive device, or other dangerous weapon.
(X) (h) refrain from excessive use of alcohol.
(X) (i) refrain from any use or unlawful possession of a narcotic drug and other controlled substances defined in 21 U.S.C.§802 unless prescribed by a licensed medical practitioner.
( ) (j) undergo medical or psychiatric treatment and/or remain in an institution, as follows:

( ) (k) execute a bond or an agreement to forfeit upon failing to appear as required, the following sum of money or designated property

( ) (l) post with the court the following indicia of ownership of the above-described property, or the following amount or percentage of the above-described money:

( ) (m) execute a bail bond with solvent sureties in the amount of $
( ) (n) return to custody each (week)day as of _____ o'clock after being released each (week)day as of) _____ o'clock for employment, schooling or the following limited purpose(s):

( ) (o) surrender any passport to
( ) (p) obtain no passport
(X) (q) the defendant will submit to drug/alcohol testing as directed by the pretrial office. If testing reveals illegal drug use, the defendant shall participate in drug and/or alcohol abuse treatment, if deemed advisable by supervising officer.
( ) (r) participate in a program of inpatient or outpatient substance abuse therapy and counseling if deemed advisable by the supervising officer.
( ) (s) submit to an electronic monitoring program as directed by the supervising officer.
(X) (t) no internet access at all i.e. computers, pda, email, etc.
(X) (u) If dft is to leave the state of UT he is to get permission from USPO
(X) (v) Maintain residence at fathers home, unless dft has permission from USPO
(X) (w) Dft is to participate in a Mental Health Evaluation and abide by all recommendations provided
(X) (x) No Unsupervised contact with individuals under the age of 18 unless supervised by an adult with permission from USPO

TO THE DEFENDANT:

Advice of Penalties and Sanctions

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

A violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of release, an order of detention, and a prosecution for contempt of court and could result in a term of imprisonment, a fine, or both.

The commission of a Federal offense while on pretrial release will result in an additional sentence of a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be in addition to any other sentence.

Federal law makes it a crime punishable by up to 10 years of imprisonment, and a $250,000 fine or both to obstruct a criminal investigation. It is a crime punishable by up to ten years of imprisonment and a $250,000 fine or both to tamper with a witness, victim or informant; to retaliate or attempt to retaliate against a witness. victim or informant; or to intimidate or attempt to intimidate a witness, victim, juror, informant, or officer of the court. The penalties for tampering, retaliation, or intimidation are significantly more serious if they involve a killing or attempted killing.

If after release, you knowingly fail to appear as required by the conditions of release, or to surrender for the service of sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

(1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years of more, you shall be fined not more than $250,000 or imprisoned for not more than 10 years, or both;

(2) an offense punishable by imprisonment for a tem of five years or more, but less than fifteen years, you shall be fined not more than $250,000 or imprisoned for not more than five years, or both;

(3) any other felony, you shall be fined not more than $250,000 or imprisoned not more than two years, or both.

(4) a misdemeanor, you shall be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be in additions to the sentence for any other offense. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgment of Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release , to appear as directed , and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions set forth above.

Signature of Defendant

280 400 N

Address

Springville UT 801 489-4008

City and State Telephone

Directions to the United States Marshal

(✓) The defendant is ORDERED released after processing.

( ) The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judicial officer that the defendant has posted bond and/or complied with all other conditions for release. The defendant shall be produced before the appropriate judicial officer at the time and place specified, if still in custody.

Date: 9 August 2006

Signature of Judicial Officer

Magistrate Judge Paul M. Warner

Name and Title of Judicial Officer

PROB 12B (1/05)

United States District Court
for the District of Utah

Request and Order for Modifying Conditions of Supervision With Consent of the Offender

(Waiver of hearing attached)

Name of Offender: **RANDY EDWARD VANCLEAF** Docket Number: **2:97-CR-00001-001-DS**

Name of Sentencing Judicial Officer: **Honorable David Sam, Senior United States District Judge**

Date of Original Sentence: **April 27, 1998**

Original Offense: **Persuading Interstate Travel for Purpose of Prostitution or Sexual Activity; Tampering With a Witness; and Failure to Appear**

Original Sentence: **Commitment to Bureau of Prisons 57 months, 36 months supervised release**

Date of Re-sentencing on Violation: **May 31, 2005**

Violation Sentence: **Commitment to Bureau of Prisons 18 months, 15 months supervised release**

Type of Supervision: **Supervised Release** Supervision to Commence: **August 12, 2006**

PETITIONING THE COURT

[x] To modify the conditions of supervision as follows:

The defendant shall reside at a community corrections center (halfway house) for up to one hundred twenty (120) days.

CAUSE

Mr. Vancleaf has no residence in the District of Utah to release to. Attempts to confirm a residence with an extended family member have been unsuccessful. A community corrections center placement in the district will enable him to reestablish himself in the area.

I declare under penalty of perjury that the foregoing is true and correct

Maria EA Sanchez, U.S. Probation Officer
Date: August 8, 2006

THE COURT ORDERS:

[X] The modification of conditions as noted above

[ ] No action

[ ] Other

Honorable David Sam
Senior United States District Judge

Date: 8/8/06

PROB 49

RANDY EDWARD VANCLEAF
2:97-CR-00001-001-DS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
PROBATION AND PRETRIAL SERVICES OFFICE

WAIVER OF RIGHT TO HEARING PRIOR TO MODIFICATION OF CONDITIONS OF SUPERVISION

I have been advised by United States Probation Officer Maria EA Sanchez thatshe has submitted a petition and report to the Court recommending that the Court modify the conditions of my supervision in Case No.2:97-CR-00001-001-DS. The modification would be:

> *The defendant shall reside at a community corrections center (halfway house) for up to 120 days.*

I understand that should the Court so modify my conditions of supervision, I will be required to abide by the new condition(s) as well as all conditions previously imposed. I also understand the Court may issue a warrant and revoke supervision for a violation of the new condition(s) as well as those conditions previously imposed by the Court. I understand I have a right to a hearing on the petition and to prior notice of the date and time of the hearing. I understand that I have a right to the assistance of counsel at that hearing.

Understanding all of the above, I hereby waive the right to a hearing on the probation officer's petition, and to prior notice of such hearing. I have read or had read to me the above, and I fully understand it. I give full consent to the Court considering and acting upon the probation officer's petition to modify the conditions of my supervision without a hearing. I hereby affirmatively state that I do not request a hearing on said petition.

R. Edward VanCleaf
RANDY EDWARD VANCLEAF

8/5/06
Date

Pamela Jenkins Case Manager for
Witness: Maria EA Sanchez
United States Probation Officer